No. 26

In the Supreme Court of the United States

OCTOBER TERM, 1944

ALLEN POPE, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 47–59) is reported in 100 C. Cls. 375.

JURISDICTION

The judgment of the Court of Claims was entered on January 3, 1944 (R. 60). The petition for a writ of certiorari was filed February 10, 1944, and granted April 3, 1944 (R. 61). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, and under Section 4 of the Special Act of February 27, 1942.

QUESTIONS PRESENTED

1. Whether the Special Act of February 27, 1942, was properly construed below as directing the Court of Claims to enter judgment for the petitioner in an amount determinable by simple computation from data referred to in said Act, on claims which the Court of Claims had theretofore decided in favor of the United States.

2. Whether the Special Act as construed below is unconstitutional as a legislative encroachment upon the judicial power of the Court of Claims.

3. Whether, even if construed as directing a new trial, the Special Act is invalid as the exercise of appellate jurisdiction by Congress.

4. Whether this Court has jurisdiction to review the determination of the court below.

STATUTE INVOLVED

The Special Act of February 27, 1942 (56 Stat. 1122) is set forth in Appendix A, pp. 113–114, *infra*.

STATEMENT

In 1924, the petitioner, Allen Pope, entered into a contract with the United States to construct a subterranean tunnel as part of the water supply system for the District of Columbia (R. 47; *Pope v. United States*, 76 C. Cls. 64).[1] The contract permitted the use of "dry-packing" and "grouting"

[1] The latter citation refers to the findings of fact and opinion of the Court of Claims, concerning these claims here involved, rendered in 1933.

in certain areas surrounding the tunnel, where cavities were left by the excavation (R. 43; 76 C. Cls. 80). To "dry-pack" an area, rocks of medium size are packed tightly into the interstices in the ground, and then "grout" (concrete of the consistency of soup) is pumped in, which, when it hardens, welds the rocks into a solid mass (76 C. Cls. 78, 79).

During the course of the work, there was constant disagreement as to the amount of dry-packing and grouting for which petitioner should be paid (*id.* 78–86). The drawings accompanying the contract designated, by a so-called "B" line, the outer limits of excavation for which payment would be made (R. 30). Where the tunnel passed through solid rock, the Government refused to pay for any dry-packing or grouting except such as had been placed within the "B" line (*i. e.*, between the outer masonry wall of the tunnel and the outside limits of compensable excavation) (76 C. Cls. 72, 84–85). In the other sections of the tunnel the Government paid only for such packing and grouting as its calculations, based upon measurements of the area, showed to have been placed above the crown of the tunnel arch (*id.* 65–72, 80–84, 86). The contractor, on the other hand, claimed compensation for whatever dry-packing and grouting he had done on the project, regardless of where it was placed (*id.* 81, 82, 86).

Certain changes made by the Government's contracting officer also resulted in disagreements.

The contracting officer lowered the "B" line by 3 inches, thus decreasing the area to be excavated, and also directed the omission of a quantity of "lagging" (timbered supports used on the side walls of certain sections of the tunnel). Cave-ins from the sides occurred, requiring that the caved-in materials be removed and that the spaces be filled with dry-packing and grout. Petitioner attributed the cave-ins to the omission of the lagging and sought to be compensated for the extra work consequent thereon (*id.* 74–75, 96–97).

Because of these disputed sums and others not now material, petitioner sued in the Court of Claims to recover some $306,000 for breach of contract (R. 47). Jurisdiction of the Court of Claims was invoked under Judicial Code § 145 (1), 28 U. S. C. 250 (1), vesting the court generally with jurisdiction over claims founded upon a contract with the United States (R. 48).

After a full trial, the court made findings of fact and rendered an opinion dealing with the issues involved (76 C. Cls. 64, 78). The court denied recovery for the additional work consequent upon the changes made by the contracting officer because they had not been ordered in writing as required by the contract (*id.* 96–99). The court also denied recovery for the additional dry-packing and grouting (*id.* 78–86). However, on the other items of claim not here material, recovery was allowed in the sum of $45,174.46 (*id.* 102).

The claim for dry-packing and grouting was disposed of as follows: The contractor sought payment for all the dry-packing and grouting which he calculated to have been employed in the project, regardless of where it was placed. He had no measurement of the space so treated, but predicated the amount of his claim on the "liquid method" measurement. That method derives the space dry-packed from the amount of grout used, which is in turn calculated from the number of bags of cement used.[2] Calculating the space dry-packed in this manner, the contractor sought to recover for dry-packing 5,561 cubic yards at the rate specified in the contract (*id.* 85, 86).

The Government denied liability for dry-packing and grouting outside the areas for which payment had already been made, and also disputed the reliability of the liquid method of measurement as proof of the areas actually dry-packed and grouted (*id.* 82). The liquid method of measurement is predicated upon the assumption that the grouting flows only into the cavities between the dry-packing, and evidence adduced at the hearing showed that this premise did not cor-

[2] One bag of cement will make 2.62 cubic feet of grout; and one cubic foot of grout will be necessary for the dry-packing in $\frac{100}{42}$ cubic feet of dry-packed space (a ratio of about 2.4 of area to 1 of grout). Hence, multiplying the number of bags of cement actually used by 2.62 cubic feet of grout, dividing the product by 0.42, and then dividing the quotient by 27 (the number of cubic feet in a cubic yard), it is theoretically possible to ascertain the cubic yards of space dry-packed.

respond with the facts in that a considerable quantity of grout had been forced into cavities outside the dry-packed area (*id.* 85).

The Court of Claims was of the opinion that the Government was liable for whatever dry-packing had been done and for so much of the grout as had actually found its way into the dry-packed areas (*id.* 85, 86). Recovery was refused, however, because of the deficiency in proof as to the areas so treated, the court agreeing with the Government that the seepage of the grout into ground remote from that dry-packed made the liquid method of measurement unreliable for determining the amount of either dry-packing or grouting (*id.* 85–86). The court accordingly found that the Government had "received the benefit" of the dry-packing actually done and the grouting in the dry-packed areas, but denied recovery for lack of proof of amount (*id.* 84–86).

Four motions for a new trial were made and denied (81 C. Cls. 658; 86 *id.* 18; 100 *id.* 375, 390), and a writ of certiorari was denied (303 U. S. 654). The judgment of $45,174.46 recovered by petitioner was duly paid (R. 48).

On February 27, 1945, the Special Act under which the current suit was brought was approved (R. 1, 2). Section 1 purported to confer jurisdiction upon the Court of Claims, "notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allow-

ance, to hear, determine, and render judgment upon the claims of Allen Pope * * * against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him" of a water supply tunnel in the District of Columbia.

Section 2 provided:

> The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope * * * for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into dry packing.

Pursuant to this act, petitioner instituted the present proceeding to recover $162,616.80, the total amount alleged to be due at contract prices for all the excavating, concreting, dry-packing, and grouting which had not previously been paid for (R. 1–9; 100 C. Cls. 391, 392). A hearing was held before a commissioner, but the Court of Claims made no findings of fact (R. 47), dismissing the petition on the ground that the Special Act under which it was brought was unconstitutional (R. 60).

Noting that the present suit had once been litigated to a final judgment under the court's general jurisdiction (R. 47–49), the majority of the court[3] rejected the Government's contention that to avoid constitutional questions the Special Act should be construed as resubmitting the matter for a new trial and as leaving the court free to decide the questions of law and fact involved (R. 50). The court held that the language of Section 2 was "mandatory as to how the case must be decided if the court undertakes the jurisdiction which the act purports to confer," and that the question presented was "whether Congress can effectively direct this court to again decide this case, which it has once finally decided under its general jurisdiction, and to decide it for the plaintiff, and give him a judgment for an amount which simple computation based upon

[3] Judge Madden delivered the opinion, in which Chief Justice Whaley and Judge Whitaker concurred (R. 47, 59).

data referred to in the special act would produce" (R. 50).[4] The court answered this question in the negative, relying upon *United States* v. *Klein*, 13 Wall. 128 (R. 50–53).[5]

Judge Littlefon dissented on the ground that Section 2 simply described in detail the basis of the liability which the Government was willing to assume, and did not constitute an interference with the court's judicial function, even though the question had once been adjudicated (R. 59–60).

SUMMARY OF ARGUMENT

I

The court below construed the Special Act as directing it to enter judgment for petitioner in an amount determinable by simple computation on claims which had once been passed on, pur-

[4] The court thought that Section 2 directed it to perform the following "small and unimportant task": "to refer to its previous findings, take certain cubic measurements and certain numbers of bags of cement which are recited there by reference, multiply those figures by the several unit prices stipulated in the contract * * * add the results, and render judgment for the plaintiff for the sum" (R. 49–50).

[5] The court stated that "It is not necessary for us to decide, and we do not decide, whether an act which merely granted a new trial, without directing the court how to decide the case upon the new trial" would infringe upon the judicial powers of the court, but the court strongly indicated that in its opinion such an act would likewise be invalid (R. 58). Cf. *Pocono Pines Assembly Hotels Co.* v. *United States*, 73 C. Cls. 447, 76 C. Cls. 334, motion for prohibition or mandamus denied, *Ex Parte Pocono Pines Assembly Hotels Co.*, 285 U. S. 526.

suant to that court's general jurisdiction and determined for the Government. It rejected the alternative construction urged by the Government that the Act merely resubmitted the matter for a new trial. This latter construction was urged in the court below to avoid the grave constitutional doubts raised by the construction adopted, but it is recognized that the former is the more reasonable in view of the statutory language and background.

II

A. The Special Act, as construed below, encroaches upon the judicial power and passes the limits placed upon legislative action by the Constitution. In deciding these claims the first time, the Court of Claims was, of course, exercising judicial power, reviewable by this Court. Congress may not compel a court to enter a new and different judgment, with terms legislatively prescribed, upon claims once passed upon and rejected pursuant to that court's general judicial jurisdiction. The elimination of all judicial discretion distinguishes this situation from those instances in which Congress has, subsequent to litigation, waived some technical defense and permitted readjudication for the purpose of securing a decision on the merits. Because the instant claims had once been litigated and a final judgment entered thereon, the Special Act likewise

differs from those acts which change the rules of law prior to or pending court action.

B. If the Act is construed as *directing* a new trial as compared with a waiver of *res judicata*, constitutional questions still remain. This Court has stated that to grant a new trial is a judicial function, and the state courts have been almost unanimous in considering a legislative grant of a new trial to be violative of the doctrine of the separation of powers. While this Court in *Cherokee Nation* v. *United States*, 270 U. S. 476, sustained such a direction, the statute was apparently regarded as merely a waiver of *res judicata*. The Court of Claims has not been consistent in result, but in the only cases where it has fully considered the matter it held that Congress may not grant a claimant a new trial. The legislature under such circumstances is exceeding its power in acting as an appellate tribunal and not as a lawmaking body.

III

A. Whether the Court of Claims derives its judicial power from Article I of the Constitution or from Article III, Congress may not interfere with it in the exercise of its judicial power. While the protection accorded judges of constitutional courts in tenure and salary is bottomed upon the specific language of Article III, the doctrine of the separation of powers has no such narrow basis. It is

inherent in our form of government, as manifested by the structure and history of the Constitution. Regardless of the source of the judicial power of the Court of Claims, that doctrine requires that courts exercising such power be free from legislative interference. Congress may withhold the determination of claims against the Government from the judiciary entirely, but if it submits them to the courts it may not attempt to review and revise the executed judicial action. Where executive or legislative review of a judgment has been provided for, the courts have held that the proffered jurisdiction was not judicial power because the judicial determination would not be final as to the rights of the parties (*Hayburn's Case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40; *Gordon* v. *United States*, 117 U. S. 697).

Congress could, of course, have paid the petitioner's claims despite the adverse judgment of the Court of Claims thereon without infringing the judicial power. But here Congress has directed the court to clothe a legislative conclusion in judicial habiliments, and if such power is conceded to Congress, unwise inroads upon the public treasury may escape either an adequate legislative or judicial check. By assuming judicial guise a payment will also escape the public scrutiny accorded political action, and shift the responsibility from Congress to the court.

Moreover, if Congress may at any time deprive the judgment of the Court of Claims of finality,

the power of this Court to continue to exercise appellate jurisdiction over the Court of Claims is very dubious. That appellate jurisdiction depends upon the judgments of the Court of Claims being final (*Gordon* v. *United States*, 2 Wall. 561, 117 U. S. 697; *Muskrat* v. *United States*, 219 U. S. 346).

B. Even if the doctrine of the separation of powers is applicable only to judicial power derived from Article III, the Court of Claims can claim its protection, since, we submit, its judicial power stems from that article. *Williams* v. *United States*, 289 U. S. 553, which holds the contrary, is inconsistent with prior authority, with constitutional history, and with the language of the Constitution, which expressly includes within the judicial power "controversies to which the United States shall be a party."

Less than three years after the adoption of the Constitution, the justices of this Court assumed that the inferior courts of the United States could act on claims against the Government if the judicial action were made final and placed beyond executive or legislative revision (*Hayburn's Case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40). Congress created the Court of Claims because it desired to have controversies respecting claims against the United States determined judicially rather than legislatively, and to that end gave the court all the attributes necessary to an inferior court exercising the judicial power of the

United States, calling it a court, giving its judges life tenure, and otherwise indicating its belief that it was creating a constitutional court. This Court originally refused to accept the appellate jurisdiction given in 1863 because the decisions of the Court of Claims were not final (*Gordon* v. *United States*, 2 Wall. 561, 117 U. S. 697). This was speedily remedied by Congress and appellate jurisdiction has been assumed ever since (*United States* v. *Jones*, 119 U. S. 477). Insofar, then, as Congress has been able, it has made the Court of Claims a constitutional court.

The decisions of this Court prior to 1928 assumed that the judicial power exercised in relation to claims against the United States was part of that embraced within Article III, and that the Court of Claims was an inferior court created under Section 1 of that article. In 1929 *Ex parte Bakelite*, 279 U. S. 438, for the first time suggested by way of dictum that the Court of Claims was not a constitutional court, because it decided only matters arising between the Government and others, susceptible of judicial determination but not requiring it. And, in *Williams* v. *United States*, 289 U. S. 553, it was held that the Court of Claims was not a constitutional court because the suits against the United States over which it has jurisdiction do not come within the phase in Article III: "controversies to which the United States is a party." This conclusion, concededly contrary to

the literal meaning of the language, was based upon a historical analysis designed to show that the immunity of the sovereign from suit precluded the application of that phrase to suits against the Government.

More complete historical research has shown no intention to withhold from the Federal courts jurisdiction over claims against the Government. The flaw in the reasoning in the *Williams* case is the failure to distinguish the bestowal of judicial power from the waiver of sovereign immunity. The premise that Article III is not a consent to suit is correct; but it does not follow that where such consent has been given, a suit against the Government is not a "controversy to which the United States is a party." While sovereign immunity was well known at the time of the framing of the Constitution, it was equally known that such immunity could be, and had been, waived both in England and here. Virginia, Delaware, Maryland, Georgia, North Carolina, Connecticut, and New Jersey had all submitted to judicial determination controversies involving the Government. Thus there is no reason for concluding that the Constitution was intended to have any but its literal meaning when it placed within the potential jurisdiction of the Federal courts controversies to which the United States is a party. We submit that the earlier authorities correctly held that the judicial power exercised in connec-

tion with claims against the Government lies within the judicial article, and that *Williams* v. *United States* was in error in holding the Court of Claims not to be a constitutional court.

C. The Court of Claims, as a constitutional court, may continue to exercise non-judicial functions just as do the courts of the District of Columbia; the plenary power exercised by Congress in creating each court is derived both from Article III and Article I. Advisory jurisdiction has been refused by the courts when requested to take judicial form, but the non-judicial duties of the Court of Claims are totally distinct, in procedure and in the form of result, from its judicial functions. The applicability of the doctrine of legislative courts to the territorial tribunals will not be affected by a departure from the *Williams* case, since these courts are specially treated because of the state of pupilage of the territories, their usually temporary status, and their peculiar character as property of the United States.

IV

If the Special Act calls for judicial action by the Court of Claims, this Court may undoubtedly review the determination made below. If, however, the Court of Claims was required to act in a non-judicial capacity, this Court may not be able to review its action in refusing jurisdiction (*Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S.

693). That case may be distinguishable, however, in that there the court in construing the statute was clearly acting in an administrative and non-judicial capacity, whereas here the Court of Claims, in rejecting jurisdiction on the grounds of the unconstitutionality of the jurisdictional act, was making a decision peculiarly judicial in character and ordinarily reserved to the judiciary.

ARGUMENT

If the construction given to the Special Act by the court below was correct—and we think it the more reasonable of the two alternatives—we submit that the Act was properly held invalid as an encroachment by the legislature upon the judicial powers of the Court of Claims. The Act may also be invalid if it directs the granting of a new trial, as compared with a waiver of *res judicata*.

The conclusion that the Act is invalid is in our view not dependent upon whether the Court of Claims exercises judicial power derived from Article III of the Constitution, as the earlier decisions of this Court assumed, or judicial power derived from Article I, as was held in *Williams* v. *United States*, 289 U. S. 553. But if the origin of the judicial power is material, we suggest that the *Williams* case warrants reconsideration, since we believe its decision and rationale do not square with the relevant constitutional history.

I

The Construction Placed Upon the Special Act by the Court of Claims Is the More Reasonable of Alternative Constructions

The refusal of the court below to take jurisdiction was based upon its construction of the Special Act as "a legislative direction to a court which has already heard and decided a case, to hear it again and decide it differently" by rendering judgment for the prior losing party in an amount determinable by simple computation (R. 49–50, 52–53).

Realizing that such construction raised grave constitutional doubts as to the validity of the Special Act, and invoking the principle that in such circumstances a statute should be given a different construction if possible (*Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390; *Chippewa Indians* v. *United States*, 301 U. S. 358, 376), the Government suggested in the court below that the act could be construed as a resubmission of the case to the court for a new trial. (See Memorandum for the United States filed with this Court in this case March 1944, p. 7, n. 2.) The Government's contention was based upon the possible existence of an ambiguity between Section 1, which empowers the Court of Claims in familiar jurisdictional language to "hear, determine, and render judgment" upon specified

claims,[6] and Section 2 (which is referred to in Section 1), directing a judgment for plaintiff and prescribing the formula for computing its amount. Under the proposed alternative construction, Section 2 would either be read as a description of petitioner's claims, or as specifying the amount of recovery if the court should find liability (cf. *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 135–136), or would be dropped as an invalid separable part of the act.

The Government, however, recognized the considerable difficulties in the construction for which it contended. As between the two alternatives, the construction adopted below is undoubtedly more largely consistent with the statutory language and background. Cf. *Roberts* v. *United States*, 92 U. S. 41. Section 2, by directing the court "to determine and render judgment at contract rates upon the claims" of petitioner "for certain work performed for which he has not been paid, but of which the Government has received the use and benefit," is in effect an admission of liability. And

[6] Similar language has been construed as submitting the case to the court for judicial consideration and decision. *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500 (to hear and determine); *Stanton* v. *United States*, 68 C. Cls. 379 (to hear, consider, and determine * * * and to enter decree or judgment); *Randall* v. *United States*, 71 C. Cls. 152, certiorari denied, 283 U. S. 826 (to hear, consider, and determine * * * and to enter decree or judgment against the United States). See also *United States* v. *Cumming*, 130 U. S. 452.

the detailed description in Section 2 of the work which has been performed and which should be paid for, plus a recital of the method by which compensation should be computed, would likewise seem to foreclose any issue as to the amount of damages.[4]

While Section 3 makes reference to "additional evidence" to be taken at the hearing under the Special Act, Section 2 leaves no room for any change in result, whatever the additional evidence may be. For that section directs judgment at contract rates based not upon the work actually done, but upon the work previously "found by the court to have been performed"; and based not upon the materials actually used, but upon those "determined by the court's previous findings" (R. 1–2).[5]

[4] Petitioner in his main brief herein (blue cover, p. 17) compares the instant case to the special act applied in *Indians of California* v. *United States*, 98 C. Cls. 583, certiorari denied, 319 U. S. 764. The comparison does not hold, for although the special act there involved prescribed the value of the land for which judgment could be rendered, it left to the court, without any prescribed formula, the ascertainment of the value of all the other items of recovery, such as livestock, clothing, implements, facilities, etc. (98 C. Cls. at 589). The act also submitted to the court the determination of a plea in set-off (id. 593, 599). Moreover, so far from directing entry of judgment for one of the parties, it merely submitted the case for the "determination of the equitable amount due" to plaintiffs (id. 592).

[5] Judgment is to be rendered "at contract rates"; the "excavation and concrete work" for which payment should be made is that previously "found by the court to have been performed."; the "amount of dry packing" is "to be determined

For these reasons, we believe that the construction of the Special Act reached below was wholly rasonabl and finds strong support in the language of the Act. Under that interpretation, the court's sole task under the act is "to refer to its previous findings, take certain cubic measurements and certain number of bags of cement which are recited there by reference, multiply those figures by the several unit prices stipulated in the contract for the several kinds of work, add the results, and render judgment for the plaintiff for the sum" (R. 49–50).

The court's function would appear to be equally limited in regard to the claims "for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer," which lowered the upper "B" line 3 inches and

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by the liquid method * * * based on the volume of grout actually used"; and "the amount of grout" is "to be determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into dry packing" (R. 1–2).

Petitioner contends (Br. 20) that this is not a dictation to the court "as to method or amount," but "merely authorized the court" to use that method (Supp. Br. [white cover] 28, 29). The language of Section 2, which uses words of direction and not words of description, is sufficient refutation of this contention. The amount of dry packing is "to be determined" by the liquid method and likewise the amount of grout is "to be determined" by certain previous findings of the court—a verb form which looks to the future and clearly refers to the function imposed upon the court "to determine and render judgment."

omitted the timber lagging from the side walls of the tunnel. In the previous action, the court had found that pursuant to these orders, the contractor had removed 287 cubic yards of material, replacing it with an equal amount of cement. This entitled him to $10,727 at contract rates. The court, however, had denied recovery because the change orders had not been in writing. Here, too, the judgment to be rendered is to be based not upon new evidence but upon the work previously "found by the court to have been performed." And the Special Act, in directing the court "to render judgment at contract rates" for the work done pursuant to the change orders, apparently required judgment for $10,727, regardless of whether or not such orders were in writing.[9]

As an example of the result which the Special Act would produce if followed to the letter, the court below stated that it would require a judgment of some $81,000 for petitioner for "exca-

[9] This was the construction placed upon the bill by the Attorney General when asked for his opinion prior to its enactment (Letter of April 28, 1941, from Attorney General to Hon. Dan R. McGehee, Chairman, Committee on Claims, House of Representatives). However, the Committee Report states that the Act does not waive the requirement that change orders be in writing, since the Committee had concluded that the court was in error in not finding that the orders here in question were actually in writing (H. Rept. No. 865, 77th Cong., 1st Sess., pp. 3, 4). But while Congress may have thought the error obvious, the Act does not make recovery on these claims dependent upon agreement by the court with the legislative assumption.

vating materials which caved in over the tunnel arch," despite the fact that the payment for grouting and dry-packing was intended to cover the work of removing such caved-in materials (R. 55–57).[10] Petitioner argues that by characterizing this claim as unmeritorious, the court below has in fact exercised "the very kind of authority which it says the act does not confer" (Br. 21). This contention misconceives the point made by the court below, which was not to hold the claim without merit but to show that the Special Act directs judgment for a claim which the court, if left to the exercise of a judicial function, would never allow. The fact that the court had no power under the Special Act to implement its views on the merits of the claim by an appropriate judgment supports its view that it was prevented from judicially determining the claim.

II

The Special Act, as Construed Below, Is an Improper Legislative Encroachment Upon the Judicial Power

When the Court of Claims first decided petitioner's claims in 1933, under the general juris-

[10] Petitioner argues that the court is left free to determine the amount of excavation (Supp. Br. 28). But it is clear that since petitioner claims to have filled all excavated spaces with dry-packing, and since Section 2 directs the court to determine the space dry-packed according to the number of bags of cement used, the cubic quantity of materials excavated would necessarily be identical with the cubic quantity of dry-packing.

diction vested in it by Section 145 (1) of the Judicial Code (28 U. S. C. 250 (1)), it, of course, exercised judicial power (*Williams* v. *United States*, 289 U. S. 553, 567; see *United States* v. *Sherwood*, 312 U. S. 584, 587). While this Court denied certiorari from the 1933 decision (303 U. S. 654), it had jurisdiction to review the case (Act of February 13, 1925, c. 229, Section 3 (b), 43 Stat. 939, 28 U. S. C. 288 (b); *United States* v. *Jones*, 119 U. S. 477).[11]

As construed below, the Special Act constitutes a legislative direction to the Court of Claims to set aside the judgment adverse to petitioner which had already been rendered in a judicial proceeding, and instead to enter a judgment in favor of petitioner upon the same facts, in an amount readily ascertainable by simple mathematical computation from the previous findings of the court. The function thus called for was purely ministerial, requiring no exercise of judicial discretion. Cf. *Clark* v. *Williard*, 292 U. S. 112, 118; *Cole* v. *Violette*, 319 U. S. 581, 582; *Gulf Refining Co.* v. *United States*, 269 U. S. 125,

[11] Whether a proceeding "is a judicial one" depends "upon the nature of the proceeding which Congress has provided." See *Tutun* v. *United States*, 270 U. S. 568, 576. The proceedings in the Court of Claims are obviously judicial in nature, involving adverse parties, pleadings, a trial and hearing on both fact and law, a record of evidence and other proceedings, and a judgment which is final unless reviewed by this Court. See 28 U. S. C. 265, 269, 274–278, 281–286, 288.

135–136; *Mower* v. *Fletcher*, 114 U. S. 127, 128. We believe the court below was correct in holding that Congress has no power to nullify a judicial decision of the Court of Claims which had become final, and to direct that court to perform the ministerial function of entering a different judgment upon the same facts.

If this Court should reject the construction below and should hold that the Special Act directs a new trial, as contrasted with a mere waiver of *res judicata*, we suggest that the Act would likewise be invalid as an exercise of appellate jurisdiction reserved by the Constitution to the courts.

In this Point we shall consider whether Congress possess the right to interfere in the manner referred to with the performance of the judicial function generally. In Point III we shall consider whether the Court of Claims is subject to the same protection as other courts against legislative interference of this sort.

A. AN ACT SETTING ASIDE A JUDGMENT AND DIRECTING THE ENTRY OF A DIFFERENT ONE INTERFERES WITH JUDICIAL POWER

The Special Act constitutes a greater interference with the judicial power than has ever previously been countenanced by this Court, or even tacitly accepted by the court below. Never has this Court sanctioned a statute whose purpose and effect were, as here, to nullify a judicial decision and to control and direct judicial action

in the same case. On the contrary, it has held that a statute which prescribes "rules of decision to the Judicial Department of the government in cases pending before it," thereby passes "the limit which separates the legislative from the judicial power" (*United States* v. *Klein*, 13 Wall. 128, 146, 147). The result would seem to follow *a fortiori* where the rule of decision is prescribed in a case already decided.

In the *Klein* case the Court of Claims had rendered a judgment for plaintiff under a general statute of 1863, for the value of property captured by the Union Army during the Civil War. Plaintiff's right to sue depended upon a Presidential pardon for participation in the "rebellion." While the judgment was pending on appeal to this Court, Congress passed an act in 1870 providing that whenever it was shown that a suit under the 1863 act was based upon such a pardon, the jurisdiction of the Court of Claims over the suit should cease; and that whenever it should appear that a judgment of the Court of Claims had been founded on such a pardon, this Court should immediately dismiss any appeal in such a suit for want of jurisdiction (16 Stat. 235). The 1870 act was held unconstitutional for the reasons expressed in the opinion of Chief Justice Chase (13 Wall. at 146):

> It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely

on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

We think not * * *.

The Chief Justice also said (13 Wall. at 147):

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

> It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, "the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."
>
> Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

If the principle of this case is applicable here, as we believe it is, the decision below is entirely correct. For the Special Act plainly prescribes "a rule for the decision of a cause in a particular way." While Congress, representing one of the parties to the controversy, is not here deciding the controversy in favor of the Government, as in the *Klein* case, the legislative direction as to the result to be reached by the court is no less specific

and mandatory. In the instant case, as in the *Klein* case, the court is instructed to enter a specified judgment after ascertaining a simple fact from the prior record in the case: there, the recital in the pardon; here, the number of bags of cement and like data set forth in the court's earlier findings. There is indeed an even greater interference with judicial power here than in the *Klein* case. There the statute was of general application and affected a case pending on appeal. Here the statute is directed at a single case which had been finally decided, and in which certiorari had been denied by this Court.

The principles given effect in the *Klein* case have been repeatedly recognized by this Court, in terms even more clearly applicable to this case. Thus, in a decision upholding a statute granting a "new remedy by way of review" in an appellate court, this Court stated that "it is undoubtedly true that legislatures cannot set aside the judgment of the courts, compel them to grant new trials, * * * or direct what steps shall be taken in the progress of a judicial inquiry" (*Stephens* v. *Cherokee Nation*, 174 U. S. 445, 478). Again, in *James* v. *Appel*, 192 U. S. 129, 136, a territorial statute providing that motions for new trials were to be deemed overruled if not acted upon before the end of the term, was attacked as "an unconstitutional assumption of judicial functions" by the legislature. Mr. Justice Holmes,

speaking for the majority of this Court, upheld the statute and rejected this contention on the ground that "the legislature does not direct a judgment but merely removes an obstacle to a judgment already entered" (192 U. S. at 136). And in *Paramino Co. v. Marshall*, 309 U. S. 370, 378, this Court upheld a private act of Congress authorizing administrative review of an award of compensation for disability theretofore made by the Employees' Compensation Commission, notwithstanding that it resulted in the award of additional compensation for the disability after expiration of the original time for review. Speaking for the Court, Mr. Justice Reed concluded that the legislation was not "an excursion of the Congress into the judicial function," pointing out that the "private act does not set aside a judgment, create a new right of action or direct the entry of an award" (309 U. S. at 378; see also 309 U. S. at 381, and note 25).

The constitutional obstacles to the overturning of a judgment by the legislature, even in a field in which its power is plenary, have been vividly described by Mr. Justice Rutledge in his concurring opinion in *Schneiderman v. United States*, 320 U. S. 118, which involved a proceeding to cancel a certificate of naturalization on the ground that it had been "illegally procured," brought under § 15 of the Naturalization Act of 1906 (34 Stat. 596).

The majority of this Court refused to consider, as not necessary to its decision (320 U. S., at 124)

> whether, aside from grounds such as lack of jurisdiction or the kind of fraud which traditionally vitiates judgments, cf. *United States v. Throckmorton*, 98 U. S. 61; *Kibbe v. Benson*, 17 Wall. 624, Congress can constitutionally attach to the exercise of the judicial power under Article III of the Constitution, authority to re-examine a judgment granting a certificate of citizenship after that judgment has become final by exhaustion of the appellate process or by a failure to invoke it.

Mr. Justice Rutledge, concurring with the majority in the conclusion that the evidence adduced had not been sufficient to justify cancellation, emphasized (at pp. 168–169)—

> the vital fact that it is a *judgment*, rendered in the exercise of the judicial power created by Article III, which it is sought to overthrow, not merely a grant like a patent to land or for invention. Congress has plenary power over naturalization. That no one disputes. Nor that this power, for its application, can be delegated to the courts. But this is not to say, when Congress has so placed it, that body can decree in the same breath that the judgment rendered shall have no conclusive effect. Limits it may place. But that is another matter from making an adjudication under

> Article III merely an advisory opinion or prima facie evidence of the fact or all the facts determined. Congress has, with limited exceptions, plenary power over the jurisdiction of the federal courts. But to confer the jurisdiction and at the same time nullify entirely the effects of its exercise are not matters heretofore thought, when squarely faced, within its authority. To say, therefore, that the trial court's function in this case is the same as was that of the admitting court is to ignore the vast difference between overturning a judgment, with its adjudicated facts, and deciding initially upon facts which have not been adjudged. * * * .
>
> It is no answer to say that Congress provided for the redetermination as a part of the statute conferring the right to admission and therefore as a condition of it. For that too ignores the question whether Congress can so condition the judgment and is but another way of saying that a determination, made by an exercise of judicial power under Article III, can be conditioned by legislative mandate so as not to determine finally any ultimate fact in issue.[1]

It is clear that the Special Act here involved represents the type of legislative interference with

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[1] In *Johannessen* v. *United States*, 225 U. S. 227, 241, this Court sustained the statute involved in the *Schneiderman* case as a "new form of judicial review" of a judgment, but assumed that it would be bad if it had represented "an exercise of the judicial power by the legislative department."

the judiciary which all these cases condemn. The statute is not one of general applicability, which is given effect in a pending judicial inquiry, such as was involved in *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226; see also *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, 542. It has reference only to the particular claims of Allen Pope and its sole purpose is to have the Court of Claims render a more favorable judgment for him than he had previously obtained in that court on identical facts.

Petitioner compares the Special Act to those given effect by the Court of Claims in *Nock* v. *United States*, 2 C. Cls. 451; *De Luca* v. *United States*, 84 C. Cls. 217; *Murphy* v. *United States*, 35 C. Cls. 494; and *Alcock* v. *United States*, 74 C. Cls. 308. Each of those statutes permitted the relitigation of claims which had formed the subject of a previous suit in the Court of Claims. But in each case some technical defense had operated to defeat recovery and had prevented consideration of the merits of the claims; the acts eliminated such defenses either by expanding the jurisdiction of the court or by waiving particular defenses, thus converting a moral or equitable obligation into a legal one. But whereas those acts eliminated some ob-

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The statute involved in *Nock* v. *United States*, 2 C. Cls. 451, permitted a second suit to be brought to be decided "in accordance with the principles of equity and justice" after a first suit for breach of contract had been defeated on the

stacle to the exercise of judicial discretion, the instant act seeks to prevent such exercise; and whereas those acts left the court free to consider and apply the facts and the law to the changed situation, according to customary legal principles, the instant act denies such freedom and compels a specified result.

It may perhaps be urged that the requirement that the change orders be in writing is a technical defense which may be waived like any other. But the Special Act does not stop with the waiver of this and other defenses such as *res judicata*, release, and the statute of limitations. It does not direct the Court of Claims to determine

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"technical legal ground" that the contract as originally written gave the Government the right to rescind whenever it pleased. That before the court in *Murphy* v. *United States*, 35 C. Cls. 494, was construed by the court as conferring "equitable jurisdiction" upon it and as eliminating "those rigid rules of law" originally applicable to the case. The statute on which the suit in *Block* v. *United States*, 74 C. Cls. 308, was based, waived the defense of the Government's nonliability for tort and of no action by Government officers under color of authority. *De Luca* v. *United States*, 84 C. Cls. 217, concerned a statute which waived the defense of previous settlement.

Contrary to the assumption apparently made by the House Committee in its report (H. Rept. No. 865, 77th Cong., 1st Sess.), the failure to put the change orders in writing was not the ground for denying recovery as to all of the rejected items, but related to less than half the claims in suit. See 76 C. Cls. 74-75, 96-99.

whether any order, oral or written, was made, that is, to decide the case judicially on the basis of the waiver of the defense. On the contrary, it directs the court to render judgment in an amount ascertainable by reference to findings which the court had previously made as a basis for a contrary judgment. Without altering the legal rules which had impelled judgment for the Government, Congress has directed the Court of Claims, upon the same findings and the same record, to enter judgment for petitioner in a prescribed amount.

This case is to be distinguished from the situation which arises when Congress enacts a law in advance of litigation, even when it is to be applied only to a specific case. See *Menominee Indians* v. *United States*, C. Cls. No. 44,298, decided February 7, 1944. Such legislation may even affect judgments already rendered, to the extent that they are continuing and affect future conduct, but not to the extent that they have adjudicated rights. For instance, after this Court had affirmed a decree directing the abatement of a bridge as an obstruction to navigation, Congress passed an act authorizing maintenance of that bridge as a postroad for the mails. This Court gave effect to that statute, dissolving the prior decree (*Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421, 437), but expressly noted the distinction between the power of Congress to

alter the illegality of the bridge for the future, and the absence of power to affect the operation of the decree in respect of rights already adjudicated, such as the right to costs and damages.[15] And in the *Klein* case this Court distinguished the *Wheeling Bridge* case on the ground that (13 Wall. at 146–147):

> No arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence

[15] Mr. Justice Nelson said (18 How. at 431–432):

"Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. The decree before us, so far as it respects the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law. But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the mean time, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced."

should have, and is directed to give it an effect precisely contrary.[16]

The crucial distinctions between the instant case and the cases in which Congress has affected pending or future litigation are these: Either the suit had not been terminated, or if it had, Congress permitted readjudication under altered rules or defenses without dictating the result. The courts were left free to assess the effect of the Congressional act and to determine whether an equitable or a moral or a technically unrecoverable obligation had, due to such act, become a legal and recoverable one; they were not directed to find legal, or to treat as binding, what they had found not to be legal or binding. The courts were not ordered to decide a particular case in a particular way; they were free to grant or deny judgment, as they deemed proper.

[16] For the same reason: the statutes involved in *Menominee Indians* v. *United States*, *supra*; *Indians of California* v. *United States*, 98 C. Cls. 583, certiorari denied, 319 U. S. 764; *Vigo's Case*, 21 Wall. 648; and *Roberts* v. *United States*, 92 U. S. 41, cited by petitioner, are distinguishable, since by waiving some technical defense or changing an applicable rule of law, Congress created "new circumstances" to which the court was left free "to apply its ordinary rules." In the same category are *United States* v. *Hossmann*, 84 F. (2d) 808, 810 (C. C. A. 8); *James* v. *United States*, 87 F. (2d) 897 (C. C. A. 8); *United States* v. *McKee*, 91 U. S. 442; *Braden* v. *United States*, 16 C. Cls. 389; *Garrett* v. *United States*, 70 C. Cls. 304; *Cross* v. *United States*, 14 Wall. 479; *Harvey* v. *United States*, 105 U. S. 671; *United States* v. *Cumming*, 130 U. S. 452.

B. IF CONSTRUED AS DIRECTING A NEW TRIAL, THE SPECIAL ACT MAY ALSO BE INVALID

The court below held, and we believe correctly, that the Special Act does not merely grant a new trial, since it does not leave it to the court to determine whether upon reconsideration the prior decision should be modified, but requires the court to enter judgment within the bounds set forth in the Act. But even if the Special Act should be construed to require the court to rehear a case previously determined by it under its general jurisdiction, it is doubtful whether it would not overstep the limits which separate the legislative from the judicial power. This Court has recognized that to grant a new trial is a judicial function (*Stephens* v. *Cherokee Nation*, 174 U. S. 445, 478; *Wallace* v. *Adams*, 204 U. S. 415, 422),[17] and while it has upheld an act which "authorized, empowered, and directed" the Court of Claims to rehear part of a claim, it apparently regarded the statute primarily as a waiver of *res judicata* (*Cherokee Nation* v. *United States*, 270 U. S. 476).[18]

[17] A direction to a court to rehear a case upon which it has already passed is to be distinguished from the grant of a new remedy by way of judicial review by a coordinate or appellate tribunal, to determine whether error, fraud, or other impropriety had taken place. *Wallace* v. *Adams*, 204 U. S. 415, and *Johannessen* v. *United States*, 225 U. S. 227, involved statutes of this character. Cf. *Schneiderman* v. *United States*, 320 U. S. 118, 124.

[18] The opinion in *Cherokee Nation* v. *United States* does not discuss whether a direction to this Court to grant a new

The state courts which have considered the matter have been practically unanimous in condemning as an invasion of judicial authority statutes purporting to grant a new trial (*Dorsey* v. *Dorsey*, 37 Md. 64; *Petition of Siblerud*, 148 Minn. 347, 182 N. W. 168; *Merrill* v. *Sherburne*, 1 N. H. 199; *Matter of Greene*, 166 N. Y. 485, 60 N. E. 183; *De Chastellux* v. *Fairchild*, 15 Pa. 18; *Taylor & Co.* v. *Place*, 4 R. I. 324; and see 3 A. L. R. 450, which collects the cases including the few decisions to the contrary). A statute authorizing, but not requiring, a court to grant a new trial falls in a different category; it has the effect of waiving an impediment to a new trial (such as *res judicata*, or the term rule) but still leaves the matter to the court for determination.

It is true that the Court of Claims has not been entirely consistent in this respect. Thus, *Grant* v. *United States*, 18 C. Cls. 732 (appeal dismissed for lack of jurisdiction, 110 U. S. 225), gave effect in 1883 to a statute directing it "to reopen and readjudicate" an already decided case upon the evidence previously submitted, to determine

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trial as contrasted with a waiver of an adjudication would be constitutional (cf. 270 U. S. at 486). It cited *Nock* v. *United States*, 2 C. Cls. 451, in which the Court of Claims stated that an attempt by Congress "to award judgment" or "to grant a new trial judicially" would exceed the powers of Congress, unlike a statute permitting readjudication. Cf. *United States* v. *Hossmann*, 84 F. (2d) 808 (C. C. A. 8); *James* v. *United States*, 87 F. (2d) 897 (C. C. A. 8); *Hampton & Branchville R. R. Co.* v. *United States*, 89 C. Cls. 117.

whether there had been error in the entry of judgment. And in 1900, *Murphy* v. *United States*, 35 C. Cls. 494, applied an act remanding a decided claim "for a further hearing" upon the former evidence and new evidence, to be redecided under "equitable jurisdiction." But in neither case were constitutional questions raised or discussed. And in 1932, when the matter was fully considered, the Court of Claims unanimously stated that Congress could not validly direct the court to grant a new trial in a case already adjudicated under its general jurisdiction (*Pocono Pines Assembly Hotels Co.* v. *United States*, 73 C. Cls. 447).[19]

The vice in a legislative direction to a court to grant a new trial is that under such circumstances the legislature is acting not as a law-making body but as an appellate court. It remands the case presumably because it considers the court to have erred either in its finding of the facts or in its determination or application of the law. These are peculiarly the functions of an appellate tribunal and are not exercisable by Congress. Cf. *Hayburn's Case*, 2 Dall. 409.

[19] The majority construed the statute as merely calling for an advisory opinion and held the act to be constitutional (73 C. Cls. at 500-502); the minority, construing the act as calling for another judicial decision, held it to be unconstitutional (*id.* at 502-504). Both agreed, however, that if in fact the statute directed a new judicial trial, it would be void (*id.* at 499-500, 507).

III

The Judicial Power of the Court of Claims is Not Subject to Legislative Interference

The above principles would, in our view, unquestionably invalidate a statute containing the provisions of the Special Act as construed below, if directed to a court, such as the Federal district court exercising judicial power under Article III of the Constitution. The question remains whether the same rule applies to the Court of Claims when adjudicating claims against the United States.

A. CONGRESS MAY NOT INTERFERE WITH THE JUDICIAL POWER OF THE COURT OF CLAIMS WHETHER IT BE DERIVED FROM ARTICLE I OR ARTICLE III OF THE CONTITUTION

The *Klein* case assumes that the Court of Claims is one of the "inferior courts" in which "the judicial power of the United States" has been vested under Article III of the Constitution (13 Wall. at 147). More recently this Court has held that the Court of Claims is not a constitutional court exercising judicial power under Article III, but is a legislative court created by Congress under its power to pay the debts of the United States (Article 1, Sec. 8), and exercises "judicial power" under Article I, so that its judges are not included within the guarantee in Article III, Sec. 1 against diminution of compensation during

tenure in office." (*Williams* v. *United States*, 289 U. S. 553).

It may perhaps be argued that this decision impliedly overrules the *Klein* case; that the freedom of the judiciary from interference by the legislative is derived from Article III, which the *Williams* case held inapplicable to the Court of Claims; and that as the creature of the legislature, the Court of Claims is absolutely subject to its dictates (Cf. Pet. Br. 33). As we show hereinafter (pp. 86–103), we believe the *Williams* case erred in holding that the Court of Claims, when adjudicating claims against the United States, is not exercising "judicial power" embraced within Article III. But whether or not this is so, the decision in the *Williams* case does not conflict with the conclusion below.

1. *The Independence of the Judicial Power is Basic to Our Form of Government*

The source of the judicial power of the Court of Claims may be material in determining the power of Congress to reduce the compensation of its judges during their term; it is not necessarily controlling as to the power of Congress to nullify an exercise of judicial power, whencesoever derived, and to dictate its reexercise towards a dif-

[20] The act creating the Court of Claims provides for tenure during good behavior, *i. e.*, for life (Judicial Code § 136, 28 U. S. C. 241).

ferent result. The guarantee in Article III, Sec. 1 of a life term without diminution of original compensation applies to judges "of the Supreme and inferior courts" in which that Section vests the "judicial power of the United States;" hence, it may logically be held applicable solely to judges exercising judicial power under Article III, Sec. 2. But the doctrine of the separation of powers, which would preclude the exercise of judicial power by Congress and the interference by Congress with the exercise of such power by the courts, does not come from Article III alone, nor indeed from any mechanical arrangement of the Constitution into separate articles and sections—although the doctrine finds support in the tripartite division of governmental functions into legislative, executive, and judicial in Articles I, II, and III. The doctrine, we submit, is basic to the structure of our Government and is founded on the recognition of the sound policy of separating three essentially different powers of Government and making each independent of the others. When judicial power is being exercised, the reasons for requiring that it be "free from the remotest influence, direct or indirect, of either of the other two powers" (*O'Donoghue* v. *United States*, 289 U. S. 516, 530) are no less strong where such power is derived from Congress than where it originates in Article III.

This is implicit in several decisions of this Court. In *James* v. *Appel*, 192 U. S. 129, this Court upheld a territorial statute that was attacked as usurping judicial power, distinguishing it from one which "directs a judgment" (192 U. S. at 136). The Court was there dealing with a territorial court, deriving its judicial power under Article IV—as had been established by *American Insurance Co.* v. *Canter*, 1 Pet. 511—and yet it was assumed that the doctrine of separation of powers governed. And at a time when the Courts of the District of Columbia were considered to be legislative courts (*Hornbuckle* v. *Toombs*, 18 Wall. 648, 655), the Court of Appeals of the District held in *Ross* v. *Cemetery*, 8 App. D. C. 32, that the principle of separation of powers precluded congressional nullification of a judgment of the Supreme Court of the District. The doctrine of separation of powers has also been treated as applicable to naturalization proceedings, although these, like controversies respecting claims against the Government, need not be submitted to the judiciary for determination (*Johannessen* v. *United States*, 225 U. S. 227; Rutledge, J., concurring in *Schneiderman* v. *United States*, 320 U. S. 118, 165), a characteristic which this Court in *Williams* v. *United States*, 289 U. S. 553, 580, indicated is true only of judicial power derived from Congress' plenary power under Article I.

The requirement that judicial acts be free from legislative interference is not peculiar to our

Constitution, but rests on traditions which Anglo-American law has found to be inherent in our system of government. In *Gordon* v. *United States*, 2 Wall. 561, the Supreme Court held it had no jurisdiction of an appeal from a judgment of the Court of Claims which was subject to revision and approval by the Secretary of the Treasury. The reason for this decision, set forth in a draft opinion prepared by Chief Justice Taney (117 U. S. 697),[21] was that the powers of the Supreme Court had been "placed * * * beyond the reach of the powers delegated to the Legislative and Executive Departments" (117 U. S. at 701). The Chief Justice made it clear that this principle antedated the Constitution and rested upon sound policy. After pointing out the difference between judicial power under the Constitution and the judicial power of the English courts,

[21] Mr. Chief Justice Taney placed his draft opinion in the hands of the clerk in vacation to be delivered to the members of the Court at their reassembly, but the Chief Justice died before the judges met. The clerk complied with his request, however, and—

"It is the recollection of the surviving members of the court, that this paper was carefully considered by the members of the court in reaching the conclusion reported in 2 Wall. 561; and that it was proposed to make it the basis of the opinion, which, it appears by the report of the case, was to be subsequently prepared. The paper was not restored to the custody of the clerk, nor was the proposed opinion ever prepared. At the suggestion of the surviving members of the court, the reporter made efforts to find the missing paper, and, having succeeded in doing so, now prints it with their assent." (117 U. S. 697).

which unlike our courts cannot declare an act of the legislature void because inconsistent with Constitutional principles, Mr. Chief Justice Taney said (117 U. S. at 705-706):

> * * * Yet in that country, the independence of the Judiciary is invariably respected and upheld by the King and the Parliament as well as by the courts; and the courts are never required to pass judgment in a suit where they cannot carry it into execution, and where it is inoperative and of no value, unless sanctioned by a future act of Parliament. The judicial power is carefully and effectually separated from the executive and legislative departments. The language of Blackstone upon this subject is plain and unequivocal. (1 Bl. Com. 268, 269).
>
> "In this distinct and separate existence (says Blackstone) of the judicial power in a peculiar body of men, nominated indeed but not removable at pleasure by the crown, consists one main preservative of public liberty, which cannot subsist long in any State unless the administration of common justice be in some degree separated from the legislative and executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions and not by any fundamental principles of law, which, though

> legislators may depart from, yet judges are bound to observe. Were it joined with the executive, the union might soon be an overbalance for the legislative. * * *"
>
> These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this Court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial powers entrusted to it, the Court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution.

The *Williams* case held that the Court of Claims does not exercise judicial power under Article III, because its jurisdiction is confined to claims against the Government, a subject matter which does not require, although it is susceptible of, judicial disposition (289 U. S. at 580). But in holding the judiciary free from interference by the legislative, this Court has never indicated that the origin of the judical power being exercised—or whether the subject of the particular case necessitated submission to the judiciary—determines whether Congress may interfere with it. On the

[*] See also 10 Holdsworth, *History of English Law*, pp. 644, 648–649.

contrary, this Court has applied the principle of the judiciary's independence in numerous decisions cited but not overruled in the *Williams* case, which likewise dealt with claims against the United States.

The earliest instance was *Hayburn's Case*, 2 Dall. 409, decided in 1792, less than three years after the Constitution became effective, in which three circuit courts, whose membership included 5 of the 6 justices of the Supreme Court, ruled that they could not take jurisdiction under an act of Congress authorizing the circuit courts to hear and advise the "Secretary at War" as to the merits of certain pension claims against the Government. The Circuit Court for the District of North Carolina, which included Justice Iredell, placed this conclusion on the ground, *inter alia*, that—

> * * * no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.

In *United States* v. *Ferreira*, 13 How. 40 (1851) this Court again refused to take jurisdiction under a similar statute, and in *Gordon* v. *United States*, 117 U. S. 697 (1864), it declined appellate jurisdiction over the Court of Claims because the

decisions of that body were then subject to executive revision or approval. The uniform rationale of these decisions was that the executive and legislative power to revise a court's determination deprived it of its judicial character, so that the tribunal asked to make a determination which is subject to legislative revision could do so only as "commissioners" aiding the legislative branch; and since it was not exercising the judicial functions of a court, it was not subject to the appellate power of the Supreme Court. See *Hayburn's Case*, 2 Dall. at 409, 412; *United States* v. *Ferreira*, 13 How. at 46–50; *Gordon* v. *United States*, 117 U. S. at 702. As soon as the feature of executive supervision was eliminated, making the decision of the Court of Claims final, this Court regularly accepted jurisdiction (*De Groot* v. *United States*, 5 Wall. 419; *Vigo's Case*, 21 Wall. 648; *United States* v. *Jones*, 119 U. S. 477).

If, as the *Williams* case holds, Article III is inapplicable to the judicial disposition of claims against the Government, the citation in that case, without disapproval, of *Hayburn's Case*, *United States* v. *Ferreira*, *Gordon* v. *United States*, and the like, is consistent with only one assumption: that the doctrine which protects the judicial power from legislative encroachment is inherent in our form of Government, and does not depend upon the source of the judicial power. Such an assumption is borne out by the decisions in *United*

States v. *Klein*, *James* v. *Appel*, and *Johannessen* v. *United States*, see pp. 26–28, 30, 32, 44, *supra*.

That Congress may ask the Court of Claims to perform non-judicial functions does not alter these conclusions. When it so functions, it is outside the judicial pale; it renders not judgments but advisory opinions; it is not subject to the appellate jurisdiction of this Court, and acts solely in an "advisory or ancillary" capacity to the legislative or executive branches (*In re Sanborn*, 148 U. S. 222, 226; *United States* v. *Ferreira*, 13 How. 40, 48; *Hayburn's Case*, 2 Dall. 409, 410, 413). Here, on the other hand, the Court of Claims had acted judicially under its general jurisdiction before Congress passed the Special Act under consideration. To deny effect to the executed judicial function and to require the Court of Claims to enter a contrary judgment, leaving no room for judicial discretion, is as much an interference with the judicial function as if Congress itself had entered a judgment for petitioner in the claimed amount.

That Congress lets the court enter the judgment does not make the Act less objectionable. By arrogating to itself the prerogatives of an appellate tribunal and directing the Court of Claims to perform the ministerial task of rendering a judgment in an easily ascertainable amount (cf. *Gulf Refining Co.* v. *United States*, 269 U. S.

125, 135–136), Congress has made "an excursion * * * into the judicial function" (*Paramino Co.* v. *Marshall*, 309 U. S. 370, 81). It has sought to control and modify, not an advisory or administrative function of the Court of Claims, but an executed judicial function. Moreover, the doctrine of separation of powers requires not only "that the persons entrusted with power in any of these branches [the executive, the legislative, and the judicial] shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other" (*Kilbourn* v. *Thompson*, 103 U. S. 168, 191). Since the Constitution vests no judicial power in Congress except the power of impeachment (*Gordon* v. *United States*, 117 U. S. 697, 705; *Kilbourn* v. *Thompson*, 103 U. S. 168), it may not, because of its control over claims against the Government, usurp the functions of the court to which they are committed, and in effect assume the powers of an appellate court (*Hayburn's Case*, 2 Dall. 409; *Du Chastellux* v. *Fairchild*, 15 Pa. 18, 19; cf. *Taylor* v. *Place*, 4 R. I. 324, 337).

For these reasons, the instant case is to be distinguished from *Pocono Pines Assembly Hotels Co.* v. *United States*, 73 C. Cls. 447, in which the court was asked merely to render an advisory opinion in a matter which had already gone to judgment, and not to enter a different judgment. See p. 40, *supra*.

2. *The judicial independence of the Court of Claims is required by weighty reasons of policy*

Congress has, of course, plenary powers over expenditures of public funds, and to pay the debts of the United States (Const., Art. I, Sec. 8). Consequently, Congress would not have exceeded its powers, nor in any way detracted from the independence of the judiciary, if it had appropriated money to satisfy the claims of petitioner in full, despite the adverse judgment of the Court of Claims. Such action would be a legislative function in form and substance (cf. *James* v. *Appel*, 192 U. S. 129, 136). It would place the responsibility for the expenditure upon the legislative where it belongs. The judgment for the United States would still be final as to the rights of the parties, and *res judicata* of the issues and of the conclusion that the Government was not legally obligated to pay petitioner's claims in question.

But the Special Act does not appropriate funds to satisfy petitioner's claims; it orders the Court of Claims to enter a judgment adjudicating petitioner legally entitled to his claims as a matter of law. It invokes the court's judicial power, orders that it be exercised in the traditional manner and in judicial guise, but drains the court of all judicial discretion to do aught but what is directed in minute detail by Congress, thereby traducing the very judicial

power which had been invoked. That the same result could have been reached by Congress through a direct appropriation is hence of no moment. The vice in the special act is that the Court of Claims, having already disposed of a claim while acting as a court, is ordered to reassume jurisdiction of that claim as a court, to utilize judicial procedures, and to enter a judgment, but is forbidden to engage in any of the deliberations or mental processes of a court beyond the simple computation needed to reach the total for which Congress has directed entry of judgment. The vice is that a legislative determination that petitioner should be paid his claim is ordered to be clothed in the judicial habiliments of a judgment of a court which in the exercise of its judicial powers had reached a precisely opposite decision.

There are weighty reasons of policy for respecting the right of a court to refuse to perform such a function. A judgment of a court is normally presumed to have been rendered after a full hearing on the facts and the law; deliberation by a disinterested tribunal, and a considered conclusion usually accompanied by an explanation of its rationale. The boundaries of the dispute may be narrowed by concession or default; but an opportunity to each party to present the pros and cons for judicial consideration is an essential feature, whose denial may invalidate a judgment (*Peninger*

v. *Neff*, 95 U. S. 714). Payment of a judgment against the Government must await an appropriation (*Hetfield* v. *United States*, 78 C. Cls. 419), but the claimant is invariably assured of an appropriation, for Congress does not normally ignore an adjudicated liability of the United States.[*] Conversely, a judgment for the United States settles any question that a legal injustice has been done by the sovereign, and furnishes a convenient means of curtailing efforts to induce payment through legislative largesse.

Legislative action, on the other hand, is not ordinarily preceded by the full inquiry characteristic of a judicial decision. A hearing may be afforded, but it is not essential to legislative action.

[*] Although *Gordon* v. *United States*, 117 U. S. 697, as one of the reasons for refusal to accept appellate jurisdiction over judgments of the Court of Claims, cited the fact that execution cannot issue against the Government, the subsequent acceptance of such jurisdiction shows that the inability to issue execution was no longer considered as necessary to judicial action (*De Groot* v. *United States*; *United States* v. *Jones*, both *supra*). So also, the award of execution is not an indispensable element of a constitutional case or controversy (*Fidelity National Bank and Trust Co.* v. *Swope*, 274 U. S. 123, 132, and cases there cited) and a judgment is final "when it terminates the litigation * * * on the merits," and "leaves nothing to be done but to enforce by execution what has been determined" (*St. Louis, Iron Mountain & Southern R. R. Co.* v. *Southern Express Co.*, 108 U. S. 24, 28). A judgment on a claim against the Government is final when it establishes "the duty of the department to enforce it" though no power exists in the courts to issue formal execution to carry such judgment into effect (*Old Colony Trust Co.* v. *Comm'r of Int. Rev.*, 279 U. S. 716, 725).

Moreover, the checks imposed upon judicial and legislative action are vastly different in kind. Unwise or prodigal inroads upon the public treasury may be checked in the legislature itself or at the polls; judicial action is never subject to this kind of review. And responsibility can be evaded unless the form is respected. A private bill awarding $10,000 to John Doe sounds very different to both legislators and the electorate from one directing the Court of Claims to hear, determine, and render judgment upon the demand of John Doe according to the usual rules of judicial procedure, except that the books of John Doe shall be deemed conclusive proof of the matters appearing therein. By assuming judicial guise, a gift to John Doe can escape both the legislative and public scrutiny generally accorded political action, with responsibility laid undeservedly at the judicial door.

If the Court of Claims is to be asked by Congress to render a decision in a proceeding apparently judicial in nature, and to clothe that decision with the dignity, finality, and weight of a judgment of the court, it is not unreasonable to require that the court be free to exercise judicial discretion as to the results to be reached and the reasons for reaching them. And where the directions prescribed by the legislature impel the court to a conclusion which it had advisedly rejected after full consideration of the facts and law, that court

should have the right to protect the dignity and finality of its judgment by declining to act.

Besides undermining the respect accorded to decisions of the Court of Claims, legislation of the character of the Special Act may subject the court to the distractions and pressures flowing from the possibility of legislative reversal of its judgments. In the words of Judge Madden (R. 54–55):

> * * * It is a question of whether this court, which has for some eighty years been entrusted with the responsible and dignified function of doing justice between the United States and those who bring suit against it, is going to be permitted to perform that function with the independence and single-mindedness to justice which the task deserves. It is a question of whether the judges of this court may continue to decide their cases as their consciences, and such acumen as they have, may lead them to decide, with the confidence that their decisions will be reviewed in the traditional judicial way; with both sides of the controversy presented to the reviewing tribunal; or must, on the other hand, feel that they must weigh in the scales the ability, energy, and persistence of the parties to the suit and their counsel, since they may, in a naturally completely partisan effort, obtain a hearing before a committee of Congress, at which hearing the other side of the controversy is not presented, and secure legislation setting aside the judgment of the

court and directing the court to put its indorsement upon the judgment of members of another branch of the Government.

The fact that the Court of Claims exercises a specialized jurisdiction in the field of claims against the sovereign buttresses rather than detracts from the applicability of these considerations. With a court determining claims of citizens against their Government aggregating hundreds of millions of dollars every year, it is as essential as it is with courts of general jurisdiction that the litigant should respect the court's decisions and judgments; that he should regard them as the result of a disinterested and deliberative judicial process; and that he should expect equality of treatment regardless of political prestige or power. These considerations are peculiarly pertinent at this time, when the cessation of hostilities will usher in a tremendous number of claims based upon termination of wartime contracts, claims of veterans and the like.

This Court's unquestioned appellate power over the judgments of the Court of Claims, rendered in the exercise of its judicial power under general or special acts, presents a conceptual as well as a practical obstacle to any other result than that reached below. This Court may accept appellate jurisdiction only if the judgments of the Court of Claims are final and not subject to revision by the legislative or executive (*Gordon* v. *United States*,

2 Wall. 561, 117 U. S. 697; *United States* v. *Jones*, 119 U. S. 477; *Muskrat* v. *United States*, 219 U. S. 346). The Special Act is as fully a legislative revision of the judgment rendered by the Court of Claims in 1933 as if it had been authorized in the statute under which the court assumed jurisdiction. Since the cited decisions make it plain that the likelihood of revision, and not its actual exercise, precludes the appellate jurisdiction of this Court, the recognition by this Court of a power in Congress to review and revise judgments of the Court of Claims may be tantamount to a relinquishment of its own appellate jurisdiction over that court. For if Congress has at all times such reserve power to review, it would seem to be immaterial whether or not it is exercised in a particular case; the decision of the Court of Claims can never be deemed final and therefore never reviewable by this Court, because the legislature might at any time decide to change it (as it has done here 9 years afterwards). It would seem equally immaterial that Congress has not announced in advance its intention to review.

To pursue this argument further, suppose this Court had found in the first *Pope* decision (76 C. Cls. 64) an important principle warranting review, had granted rather than denied certiorari, and had affirmed the Court of Claims' judgment. Could Congress then have enacted the Special Act setting aside that judgment and directing entry of

a contrary decision despite the mandate of this Court? If not, then a judgment of the Court of Claims will be final, and thus judicial, not when it is rendered, but only when it is affirmed by this Court. This Court, however, can only review a judgment which is final when presented, rendered in the exercise of judicial power. And if this Court had granted the writ and affirmed, the Special Act would have the same effect as it has now; it would still nullify a judicial decision and dictate an opposite result, encroaching upon the judicial power of two courts rather than one. In view of the fact that denial of certiorari leaves the judgment as final as if the upper court had affirmed (*United States* v. *O'Grady*, 22 Wall. 641, 648), the interference in this case seems no less direct.

We suggest that the dilemma is resolved by resort to the doctrine of separation of powers. Congress need not submit the United States to suit in the courts, and may at any time withdraw a class of claims or a particular claim from the jurisdiction of the Court of Claims or of this Court (*In re Hall*, 167 U. S. 38; *District of Columbia* v. *Eslin*, 183 U. S. 62). But if it sees fit to commit a claim to the judiciary and if judicial power is finally exercised in regard thereto, we submit that Congress may no longer review or interfere with that exercise of judicial power (cf. Rutledge J., concurring in *Schneiderman* v.

United States, 320 U. S. 118, 165, 168). Although Congressional control of litigation against the Government is necessarily great, *United States* v. *Klein* demonstrates that there are limits to the ability of Congress to dictate to the judiciary the determination to be made of such claims when submitted to the judiciary. These limits are the product of the tripartite distribution of governmental powers under the Constitution, which requires that each department be independent of the others, so "that the acts of each shall never be controlled by, or subjected directly or indirectly, to, the coercive influence of either of the other departments" (*O'Donoghue* v. *United States*, 289 U. S. 516, 530). We submit that the court below correctly held that those limits were exceeded in this case.

B. THE COURT OF CLAIMS EXERCISES "JUDICIAL POWER OF THE UNITED STATES" AS DEFINED BY ARTICLE III OF THE CONSTITUTION

We have argued that judicial power, irrespective of its source, is entitled to protection against encroachment and interference by the legislative, and that Congress has vested the Court of Claims with judicial power, which it exercised in determining these claims in 1933. But if the doctrine of separation of powers, and the limitation which it imposes upon legislative interference with judicial functions, applies only to judicial power derived from Article III, it will be necessary to determine

whether the power of the Court of Claims is derived from that Article. In that case we suggest that the power exercised by the Court of Claims when adjudicating cases against the Government is a part of the "judicial power of the United States" defined by Article III. For that Article extends the judicial power "to Controversies to which the United States shall be a party." The only authority which precludes giving this provision of the Constitution its normal and literal meaning is *Williams* v. *United States*, 289 U. S. 553, a decision which does not accord with prior authority or with constitutional history, which is based upon a mistaken premise, and which was rendered without the aid of considerable relevant historical material. It is respectfully urged that, if the source of judicial power of the Court of Claims be regarded as material to decision in this case, the Court reestablish the principles implicit in its earlier decisions and recognize Article III to be applicable whenever the determination of controversies respecting claims against the United States is entrusted to the courts.

1. *The Early Authorities*

Less than three years after the Constitution became effective, all but one of the justices of this Court, in their capacity as judges of the Federal circuit courts, considered the validity of a statute authorizing those courts to examine cer-

tain pension claims against the Government by invalid veterans, to determine a just allowance for pension arrearages, to ascertain the degree of disability and "to transmit the result of their inquiry * * * to the Secretary at War, together with their opinion in writing," as to the proportion of monthly pay which would be equivalent to the ascertained degree of disability (Act of March 23, 1792, 1 Stat. 243, § 2). The Secretary at War was then authorized to place the applicant's name on the pension list, unless he suspected imposition or mistake, in which event he could withhold the name from the list and report it to Congress (*id.* § 4). Acting in behalf of Hayburn, a pension applicant, the Attorney General sought a writ of mandamus from the Supreme Court to require the circuit court for the district of Pennsylvania to act under this statute. Before the Supreme Court could decide the motion, the statute was repealed (Act of February 28, 1793, 1 Stat. 324).

However, the circuit courts for the districts of New York, Pennsylvania and North Carolina, containing five of the six members of the Supreme Court (Chief Justice Jay and Justices Cushing, Wilson, Blair, and Iredell) had previously expressed the opinion that the statute was invalid (*Hayburn's Case*, 2 Dall. 409). All agreed that the act sought to vest non-judicial power in the courts since their decisions were made subject to revision

by the executive and the legislature. But, significantly, all three opinions assumed that Article III applies when the determination of claims against the Government is entrusted to the judiciary, and that before jurisdiction of controversies in regard thereto can be taken by the courts, both the procedure and the tribunal must meet the requirements of the judicial article. Thus, the Circuit Court for North Carolina declared that the Secretary at War, who was vested by the act with a power of review over the circuit courts, was incapable of acting as an appellate tribunal in respect to such claims, because such a tribunal "must consist of judges appointed in the manner the Constitution requires, and holding their offices by no other tenure than that of their good behavior, by which tenure the office of Secretary at War is not held" (2 Dall. at 412). The opinions of the other two circuit courts make the same assumption (2 Dall. at 410, 411). Since the justices and judges joining in these opinions included men who had been prominent in the drafting of the Constitution, their interpretation of that document less than three years after it became effective an important contemporary guide to its meaning.

United States v. *Ferreira*, 13 How. 40 (1851), is a similar case, involving a special act of Congress authorizing the United States District Judge in Florida to receive and adjudicate claims of certain named persons for damages due to the opera-

tions of the American Army in Florida. The judge's decision, with the evidence on which it was founded, was to be reported to the Secretary of the Treasury, who was directed to pay the same "on being satisfied that the same is just and equitable" (3 Stat. 768; 6 *id.* 569; 9 *id.* 788). This Court held that it had no jurisdiction of an appeal from a decision by the District Judge on such claims. The ground for the decision, set forth in an opinion of Chief Justice Taney, was that since the judge's decision was not final until approved by the Secretary of the Treasury, the power to decide the claims was not conferred "as a judicial function * * * in the sense in which judicial power is granted by the Constitution to the courts of the United States" (13 How. at 46–47). The Chief Justice observed that the special act merely conferred authority upon the judge as "a commissioner to adjust certain claims against the United States" (13 How. at 47).

The rationale in both these cases is the same: What prevented the jurisdiction exercised by the inferior courts from being judicial power of the United States was not the fact that the subject matter consisted of a claim against the United States, but the revisory power in the legislative or executive. That was made explicit in two cases dealing with the power of the Supreme Court to review the decisions of the Court of Claims: *Gordon* v. *United States*, 2 Wall. 561, which held

that the revisory power over the Court of Claims vested in the Secretary of the Treasury precluded review of that court's judgments by this Court; and *United States* v. *Jones*, 119 U. S. 477, which upheld the exercise of such appellate power after the revisory procedure was eliminated.

The view that claims against the Government can be adjudicated under Article III was apparently shared by the Congress which established the Court of Claims, as believing that it would constitute an inferior court of the United States exercising judicial power under Article III of the Constitution.

2. *Congress Intended the Court of Claims to be a Constitutional Court*

The Supreme Court has declared that whether a court is a constitutional or legislative court is determined by the power under which it was created and the jurisdiction it exercises; and that the intention of Congress in creating the court is immaterial. *Ex Parte Bakelite*, 279 U. S. 438, 459, 460. We respectfully suggest that the legislative objective is not without relevance. Since Congress can create "inferior courts" under Article III and vest them with some or all of the "judicial power of the United States" under Article III, and since Congress can also create legislative courts under Article I and vest them with judicial power reviewable or exercisable by constitutional courts, it may well be of legal interest

just which powers Congress intended to invoke and bestow.

The legislative materials relating to the Court of Claims show without doubt the congressional intention that it should be a court in fact, as well as in name, exercising judicial power with all its prerogatives; that it should be "an inferior court" such as the federal district courts; and that it should exercise "judicial power" under Article III. It also shows the intention of Congress to have controversies respecting claims against the United States determined "judicially" rather than legislatively, an intention which becomes clearer with each successive act dealing with the Court of Claims.

(a) THE FIRST COURT OF CLAIMS

The middle of the nineteenth century saw mounting dissatisfaction with the treatment accorded claims against the United States. These were heard and passed on individually by Congress and disposed of by special act. The pressure of business resulted in many claims being neglected, while those accorded satisfaction obtained it more often through influence than merit.

In 1854, Senator Brodhead, of Pennsylvania, introduced a bill to establish a board of three commissioners to examine and settle claims against the United States, explaining that the proposed board would be "in the nature of a judicial tribunal" with power to take testimony on behalf

of the Government, but its decisions would not be final (Cong. Globe, 33d Cong., 2d Sess., p. 71).[25] The bill was reported by the Committee on Claims, (*id.* p. 70), but the discussions in the Senate indicated that a tribunal of greater dignity than that proposed by Senator Brodhead was desired. While agreeing that the decisions of such tribunal should not be final, Senator Hunter thought their sessions and opinions should be made public, records should be kept, and the judges should be appointed for life without power of removal in the President. (*Id.* p. 71.) Senator Clayton agreed that the new tribunal should be a court, saying (*id.* p. 72):

> These commissioners ought to be independent. If they are not judges nominally, they are so in fact, and ought to have that best of all qualities pertaining to a judge—perfect independence. I think it was in the convention of Virginia that John Marshall said, that of all the evils that could be inflicted upon a sinning people by an angry Heaven, a dependent judiciary was the worst. This is a court; call it what you please. I wish it to be substantially a court. I do not care for the name, whether you term them commissioners or judges; but I

[25] Senator Brodhead expressed doubt whether Congress had the power under the Constitution to waive sovereignty and to authorize suit either in "law or equity," and stated that the bill represented a compromise between enlarging the powers of the executive officers and enlarging those of the judiciary (*id.* p. 70).

> wish them to be independent. Now, my friend has provided in the bill that these commissioners shall be appointed by the President, by and with the advice and consent of the Senate; and "shall hold their office until the time appointed for the expiration of this act, unless sooner removed by the President." I trust the words, "unless sooner removed by the President," will be stricken from the bill. I do not wish the President himself, whoever he may be, to be liable, as he will be, constantly, to the imputation of controlling and governing the decisions of this tribunal. For the sake of the President, for the sake of the character of the tribunal, for the sake of perfect justice, I ask that the tribunal may be in fact perfectly independent.

Senator Pettit urged that claims be referred to the district courts and tried in the same manner as suits between private individuals, accurately prophesying that the establishment of a tribunal without power to enter final judgment would not relieve the pressure on Congress (*id.* pp. 72–73).

The matter was referred back to a select committee, which reported a bill differing in several important particulars from the first. In place of a board of three commissioners to hold office at the pleasure of the President, the amended bill provided for a "Court of Claims" of three judges holding office during good behavior. Its sessions were to be public and its records kept. It was given the same subpoena power as the Federal

courts (a power not given the board). However, the decisions of the court, like those of the board, were to be advisory only, and were to be reported to Congress together with the facts found and the testimony taken. Where the decision was favorable to the claimants, a bill designed to effectuate the decision was to accompany the report (*id.* pp. 105–106).

Senator Weller then proposed an amendment to call the tribunal a "board of commissioners" instead of a "court," so that tenure could be provided for a fixed period rather than during good behavior. He gave the following reasons for the proposed amendment (*id.* p. 107):

> Under the Constitution of the United States, if there be a court established, the judges of that court are to be appointed during good behavior. The only power which is given to us on that subject is by the first section of the third article of the Constitution of the United States, which provides that "the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior." In order to avoid the difficulty which is presented to my mind, I am compelled to move to change the character of this tribunal from a court to that of a board of commissioners; and I apprehend that then, under the provisions of the Constitution, it would be perfectly competent for the lawmaking power of this Government to limit the period for which the commis-

> sioners should hold their offices. It may well be doubted whether this bill creates a "court" within the meaning of the provision of the Constitution to which I have referred; but, to avoid all controversies which might arise on this subject, I deem it proper to move the amendment.

The proposal provoked a good deal of discussion, eliciting a variety of opinions as to the character of the tribunal being created. Senator Hunter, a member of the special committee, opposed the amendment, stating that it was of the greatest importance that the members of the court enjoy tenure during good behavior and be as independent of the appointing power "as the Constitution has made the judges of the United States," in order that the action of the court should be "sound, just, pure and impartial" (*id.* pp. 108–109).

Senator Pratt expressed the opinion that regardless of what the tribunal was called, it was exercising judicial power and consequently the Constitution required its judges to have tenure during good behavior. Senator Weller, the proponent of the amendment under discussion, disagreed on the ground that the court was merely "a court of inquiry—a mere tribunal to take testimony for the final action of Congress"[28] (*id.* p. 110).

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[28] "The Congress of the United States undoubtedly has power to appoint commissioners; and what is the provision of this bill but the organization of a board of commissioners

Senator Clayton, another member of the committee, agreed with Senator Pratt, pointing out that the judicial power as defined by the Constitution expressly extended to claims against the United States and that the spirit as well as the letter of the Constitution required that those passing upon such claims should be judges and should be "as independent as any other judges existing under the government" (*id.* p. 111).

Senator Chase, whose views are particularly interesting because he was a member of the Supreme Court which decided *Gordon v. United States*, 2 Wall. 561, said (*id.* p. 112):

> I cannot regard this delegation of power to these officers as a delegation, in any sense of judicial authority—judicial authority, I mean, as prescribed in the Constitution of the United States. Judicial authority implies power to determine finally upon cases submitted to it. No tribunal can be a court in the proper sense of the word, unless it has the power to determine the law in regard to the particular controversies submitted to it. There may be an appeal from it, but if not appealed from, its judgment is final.

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to ascertain * * * the facts connected with claims against this Government. There is not a word in the bill which makes the opinion of these judges the judgment of a court. * * * It is to be a mere tribunal organized for the purpose of ascertaining facts and taking testimony, and submitting that testimony to the legislative branch of the Government, where the case can finally be disposed of" (*id.* p. 110).

Senators Stuart and Douglas stated their belief (*id.* p. 113) that the bill proposed to establish—

> a court under the provisions of the Constitution, and that the Constitution prescribes the tenure of office. I also think that a mere change of the word "judges" to "commissioners" would not change the effect of the bill. I admit that a bill might be framed establishing a commission which would not be a judicial tribunal within the meaning of the Constitution; but I am of the impression that the bill now before us, though the word "judges" should be changed to "commissioners," would still constitute a judicial tribunal within the meaning of the Constitution, and therefore that the tenure of office is fixed by it.

With this diversity of opinion before it, the Senate voted upon and rejected the proposed amendment, 24 to 16, thus sustaining the position of those who wished the new tribunal to be a "court" (*id.* p. 114).

It should be noted that at the time of these debates (1855), Chief Justice Marshall's decision in *American Insurance Co.* v. *Canter*, 1 Pet. 511, was already 27 years old, so that the concept of a "legislative court" exercising judicial power derived from Article I of the Constitution (such as a territorial court) must have been well known to the Senators who discussed the merits of the bill—men obviously learned in the law. It is

significant that their discussion posed the alternatives of a constitutional court or a board of commissioners; not a constitutional court or a legislative court. And it was uniformly assumed that if the Court of Claims were to be established as a court, it would be an inferior court under Article III.

The House of Representatives passed the bill as approved by the Senate, and it became law on February 24, 1855 (10 Stat. 612).

(b) FINALITY OF JUDGMENTS

It soon became apparent, however, that the lack of finality of the decisions of the Court of Claims defeated its objective. Matters considered by the court were reviewed by Congress in the same detail and with as little expedition as matters in which that tribunal had not acted. Consequently, claimants were loath to invoke the services of that court, and the backlog of unconsidered claims grew in both Houses of Congress. Under these circumstances, President Lincoln urged Congress to empower the court to render final judgments, saying:

> It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government, especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself, in

favor of citizens, as it is to administer the same between private individuals. *The investigation and adjudication of claims, in their nature belong to the judicial department*; besides, it is apparent that the attention of Congress will be more than usually engaged, for some time to come, with great national questions. It was intended by the organization of the Court of Claims mainly to remove this branch of business from the Halls of Congress; but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation, for want of power to make its judgments final.

Fully aware of the delicacy, not to say the danger, of the subject, I commend to your careful consideration whether this power of making judgments final may not properly be given to the court, reserving the right of appeal on questions of law to the Supreme Court, with such other provisions as experience may have shown to be necessary (Cong. Globe, Dec. 3, 1861, p. 2, Appendix; 37th Cong., 2d Sess.). [Italics supplied.]

So prompted, Congress passed a bill which was intended to make the judgments of the court final, and which also provided for appeals to the Supreme Court. (12 Stat. 765). Senator Hale, who had bitterly opposed giving finality to the judgments of the Court of Claims, proposed an

amendment that no money be paid out of the Treasury for any claim passed upon by the court until an appropriation had been estimated therefor by the Secretary of the Treasury. The amendment was accepted without discussion (Cong. Globe, 39th Cong., 1st Sess., part 1, p. 770).[27]

Because of this amendment, the Supreme Court in *Gordon* v. *United States*, 2 Wall. 561, dismissed an appeal from a judgment of the Court of Claims for want of jurisdiction. According to the opinion prepared for the Court by Mr. Chief Justice Taney (117 U. S. 697, 698–699),[28] the basis of the decision was under the statute (Act of March 3, 1863, § 14)—

> Neither the Court of Claims nor the Supreme Court can do anything more than certify their opinion to the Secretary of the Treasury, and it depends upon him, in the first place, to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant, it will then rest with Congress to determine whether they will or will not make an appropriation for its payment. Neither court can by any process enforce its judgment; and whether it is paid or not, does not depend on the decision of either court, but

[27] The amendment had reference to the practice current at the time of having the Secretary of the Treasury estimate at the beginning of the fiscal year the amount necessary to pay claims against the United States for the purpose of having Congress appropriate the necessary moneys therefor.

[28] See p. 45, n. 21, *supra*.

> upon the future action of the Secretary of the Treasury, and of Congress.

Since the judgments of the Court of Claims and of the Supreme Court would not be final and conclusive upon the rights of the parties, the Chief Justice held that the power which the Court of Claims was exercising and which the Supreme Court was being asked to exercise was not judicial in character; that as a consequence of the power given the Secretary of the Treasury to review the decisions of the Court of Claims, that court was acting as a "Commissioner or Auditor;" hence, appellate jurisdiction could not be accepted because (117 U. S. at 704):

> this Court has no appellate power over these special tribunals, and cannot, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court, exercising independently the judicial power granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court.

Despite the language in the opinion relating to execution against the Government, the real objection to the acceptance of appellate jurisdiction by this Court was the power of review given the Secretary of the Treasury by the Act of March 3, 1863. After this decision, the objectionable section was immediately repealed in order to remove the obstacle to the exercise of appellate

jurisdiction by the Supreme Court (14 Stat. 9; Cong. Globe, 39th Cong., 1st Sess., part 1, p. 770). The Supreme Court then took appeals without question from the judgments of the Court of Claims (*De Groot* v. *United States,* 5 Wall. 419; *United States* v. *Jones,* 119 U. S. 477). The previous refusal to accept jurisdiction was explained as based upon the power of the Secretary of the Treasury to examine and revise the judgments of the Court of Claims; so that the removal of that power made the judgments final (*United States* v. *O'Grady,* 22 Wall. 641, 647; *United States* v. *Jones,* 119 U. S. 477, 478–479).[*]

Thus, insofar as Congress has been able, it has made the determination of claims against the Government a matter for the judiciary, and has made the Court of Claims a judicial as distinguished from a legislative tribunal. And, insofar as Congress has power to do it, it has sought to make the Court of Claims a constitutional court and to

[*] In 1883, to relieve the press of business in Congress, a bill was introduced to enlarge the jurisdiction of the Court of Claims. The report which accompanied the bill (later enacted as the Tucker Act, 24 Stat. 505, 28 U. S. C. 250) points out that the history of the courts demonstrates the advantages of having a court of justice ascertain rights as between litigants, and proposes that the jurisdiction of the court be extended to include certain claims which "should be asserted before a judicial and not a legislative tribunal." It adds that greater efficiency and justice would be secured "from the separation of the legislative and judicial functions." (H. Rep. 1077, 49th Cong., 1st sess., pp. 4, 5.)

make it free from the control of any other branch of the Government.

3. *This Court, Until 1928, Assumed That the Court of Claims Was an Article III Court*

The acceptance of appeals from the Court of Claims, viewed in the light of Chief Justice Taney's opinion in the *Gordon* case, shows an assumption that "the judicial power of the United States" under Article III extended to the determination of claims against the Government, and that the Court of Claims, which after 1866 was exercising such judicial power, was no longer the "auditor or controller" described in the *Gordon* case, but was an "inferior court" from which alone an appeal to the Supreme Court would lie, according to the *Gordon* opinion (117 U. S. at 704).

Again in *United States* v. *Klein*, 13 Wall. 128, this Court invalidated a statute imposing a rule of decision upon this Court when hearing appeals from the Court of Claims. By placing its decision on the ground of an attempted legislative encroachment upon the judicial power vested in the Supreme Court by Article III, this Court clearly indicated that it considered its appellate jurisdiction over the Court of Claims to be within the ambit of the judicial article.

Any doubt that Article III was uniformly assumed to be the source of the judicial power

exercised in determining claims against the United States, was removed by the fairly recent use made by this Court of *Hayburn's Case, United States* v. *Ferreira,* and *Gordon* v. *United States.* These decisions were invariably cited as judicial interpretations of the content of the "judicial power of the United States" vested in the inferior courts by Article III, and are the standard authorities for the principle that such courts may not take jurisdiction unless there is presented a "case" or "controversy" within the meaning of Article III, Section 2. See *Tutun* v. *United States,* 270 U. S. 568 (1926); *Willing* v. *Chicago Auditorium Ass'n,* 277 U. S. 274 (1928). Unless claims against the United States are covered by Article III, the older cases involving such claims would have been inapposite.

It was likewise uniformly believed that courts which exercised judicial power under Article III, Section 2, were "inferior courts" under Section 1 of that Article. Such was the assumption in *Hayburn's Case.* More expressly, this Court in *United States* v. *Union Pacific R. R.,* 98 U. S. 569, 602–603, referred to the Court of Claims as an "inferior court" created under Article III, like the district and circuit courts, and exercising judicial power of the United States. Like statements appear in later cases. See *United States* v. *Louisiana,* 123 U. S. 32, 35; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 384, 386; *Kansas* v.

United States, 204 U. S. 331, 342. In 1924 this Court confirmed that view of the Court of Claims by holding that Article III, Section 1, prevents the imposition of a Federal income tax upon the compensation of a judge of that court (*Miles* v. *Graham*, 268 U. S. 501, 506, 509).

4. *Ex parte Bakelite* (1929)

In 1929, however, it was suggested for the first time that Article III was not the source of the judicial power exercised by the Court of Claims. *Ex parte Bakelite*, 279 U. S. 438, decided that year, held that the Court of Customs Appeals is a "legislative court" created by Congress under Article I and not Article III, and therefore that the court could take jurisdiction of an appeal from a Tariff Commission proceeding, even though, being simply advisory to the President, such proceeding may not have been a "case or controversy" under Article III, Section 2. In reaching that conclusion, this Court included in the category of legislative courts not only the territorial courts and those for the District of Columbia, created pursuant to the plenary power over these areas vested in Congress by Article IV, Section 3 and Article I, Section 8, but also a class of "special tribunals" created by Congress "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial deter-

mination and yet are susceptible of it.". In this category the Court placed the Court of Claims (279 U. S. at 452):

> Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.
>
> The Court of Claims is such a court. It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies.

Disapproving the dictum in the *Union Pacific* case, and the obvious basis for the holding in *Miles* v. *Graham* (thus foreshadowing the decision in the *Williams* case), the Court stated that the Court

of Claims, "like the courts of the District of Columbia," is not a constitutional court (279 U. S., at 455), and declared that the judicial power exercised by the Court of Claims is "prescribed by Congress independently of Section 2 of Article III" (p. 449). The Court observed that "Congress always has treated" the Court of Claims as having the status of a legislative court (p. 454), a statement which does not square with the legislative history of the statutes creating the Court of Claims (see pp. 66–78, *supra*).

As authority for the proposition that Article III judicial power does not extend to the judicial determination of "various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it," the *Bakelite* case cited a number of decisions (279 U. S. at 451, n. 8).[30] But such of these cases as involve judicial action seem to assume the contrary; for wherever the question was raised, the Court assumed that the conditions placed by Article III upon the exercise of judicial power, including the existence of a "case of controversy," had to be met (*Fong Yue Ting* v. *United States*, 149 U. S. 698, 708; *Gordon* v. *United States*, 117 U. S. 697, 702; *La Abra Silver*

[30] This category is derived from language in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284, which, however, did not involve the question of whether a court dealing with such matters would be a constitutional court.

Mining Co. v. *United States,* 175 U. S. 423, 455). No attempt was made in the *Bakelite* opinion to reconcile its holding with these decisions, which assumed the applicability of Article III, Section 2 to matters submitted to the courts which did not require judicial determination.[31]

To support its characterization of the Court of Claims as a legislative court, the *Bakelite* opinion cited the *Gordon* case, which held judgments of the Court of Claims unappealable when subject to revision by the Secretary of the Treasury, and *In re Sanborn,* 148 U. S. 222, which held that an appeal to this Court does not lie from an advisory opinion rendered by the Court of Claims to the Secretary of the Interior. But the *Gordon* case was followed by an amendment eliminating executive review of the judgments of the Court of Claims, and subsequently the judgments of that court were reviewed by this Court, presumably as decisions of an inferior court created under Article III (*United States* v. *Jones,* 119 U. S. 477). Chief Justice Taney's description of the court, written when its decisions were subject to executive review, therefore became inapplicable after 1866 when its judgments were made final.

[31] Since the cases so holding were cited and not disapproved (279 U. S., at 451), the only possible conclusion is that the Court in the *Bakelite* case thought the "judicial power" referred to in Section 1 of Article III and that referred to in Section 2 thereof were not coterminous. Such a dichotomy does not comport with reason or with any other decision.

And although *In re Sanborn*, 148 U. S. 222, approved inferentially at least, the performance by the Court of Claims of a function characterized as "ancillary and advisory only"—that of reporting its findings and opinion on a claim referred to it by the Department of the Interior [32]—it is a legal anachronism to explain this as the designation of the Court of Claims as a legislative court. For the notion that a legislative court may exercise nonjudicial powers had not then been enunciated.[33] A more probable explanation of *In re Sanborn is that*, like *Wallace* v. *Adams*, 204 U. S. 415, it considered *Gordon* v. *United States* to prohibit only the Supreme Court, the sole court expressly provided for in the Constitution, from exercising nonju-

[32] The description of the court's function as "ancillary and advisory only" was carefully restricted to "such a case," *i. e.*, an advisory opinion without final judgment (148 U. S. at 226).

[33] It was first suggested in *Postum Cereal Co.* v. *Calif. Fig. Nut Co.*, 272 U. S. 693, that the power of Congress to require the courts of the District of Columbia to perform administrative functions was the product of the fact that such courts were legislative and not constitutional courts. In *Ex parte Bakelite*, this Court, relying upon the cases involving the courts of the District of Columbia and *In re Sanborn*, held that only legislative courts can be asked to perform non-judicial functions. Since the the courts of the District of Columbia are now recognized to be constitutional courts but may still exercise non-judicial functions, it is clear that the power of Congress to confer upon them non-judicial functions stems from the dual power over the District and not from their character as legislative courts. *O'Donoghue* v. *United States*, 289 U. S. 516.

dicial functions. Cf. *Harrison* v. *Moncravie*, 264 Fed. 776 (C. C. A. 8).

Thus, the previous decisions of this Court furnish no support for the conclusion reached in *Ex parte Bakelite*, and subsequently adopted in *Williams* v. *United States*, 289 U. S. 553, that the Court of Claims, because it handles matters susceptible of judicial determination but not requiring it, is not created pursuant to Article III of the Constitution. And no reason, grounded in policy or logic, is advanced for that view.[34] The fact that a court's business consists exclusively of matters which need not have been submitted for judicial determination would seem to be irrelevant in determining the nature of the power exercised by the court. Courts specializing in a particular type of jurisdiction are not unknown.[35] Moreover,

[34] The opinion in *Ex parte Bakelite* indicates that the power involved in determining claims against the Government is not included within Article III (279 U. S. at 449). But the Court simultaneously declares that constitutional courts "established under * * * section 2 of Article III" "can be invested with no other jurisdiction" than the "judicial power defined in that section" (279 U. S., at 449). These two propositions, if accurate, mean that this Court and the district courts, which are unquestionably constitutional courts, have no power to pass upon claims against the United States and that the statutes vesting in the former appellate jurisdiction and in the latter a concurrent original jurisdiction as a "court of claims" (*United States* v. *Sherwood*, 312 U. S. 584), are invalid.

[35] For example, the Emergency Court of Appeals acts only in review of orders of the Office of Price Administration (see § 204 (d), Emergency Price Control Act of 1942, as amended,

various matters have been submitted to constitutional courts although they could also have been determined nonjudicially, as the *Bakelite* opinion recognized. See 279 U. S., at 451, n. 8.

5. *The Williams Case*

Ex parte Bakelite (1929) prepared the way for the decision in *Williams* v. *United States*, 289 U. S. 553 (1933). The latter case held that the determination of claims against the United States lies outside Article III because such claims do not require judicial treatment and because Article III, Section 2, defining the judicial power of the United States, does not extend to suits against the United States; that the judicial power exercised by the Court of Claims is derived from Congress' power to pay debts under Article I, Section 8; that the court is therefore not a constitutional court; and that as a result the compensation of its judges is not protected by the prohibition against congressional diminution in Article III, Section 1. The decision is bottomed principally upon the notion that the phrase in Article III, Section 2 "controversies to which the United States shall be a party" could not have been intended by its fram-

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56 Stat. 31; 50 U. S. C. (Supp. III) 924 (d)). And until 1913 the Commerce Court (Act of June 18, 1910, 36 Stat. 539), composed of five circuit judges, designated from time to time for temporary service in the court, sat exclusively in cases involving orders of the Interstate Commerce Commission—cases now heard by a district court. Urgent Deficiencies Appropriation Act of October 22, 1913, c. 32, 38 Stat. 219.

ers to include cases in which the United States is party defendant because of the known sovereign immunity from suit (289 U. S., at 573). That notion, we respectfully suggest, is the product of a faulty analysis and the failure of the Court to have the pertinent constitutional history before it.

Article III, Section 2, unqualifiedly provides that the judicial power shall extend to "Controversies to which the United States shall be a Party," and, as the *Williams* case admits, this literally covers suits both by and against the United States (289 U. S., at 573). On several occasions in the past the Court has declared that this clause in Article III should be construed to mean what it says. In *Minnesota* v. *Hitchcock*, 185 U. S. 373, 384, 386, the Court said:

> This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant.
>
> * * * * * *
>
> While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the

judicial power of the United States extends to such a controversy.

See also *Kansas* v. *United States*, 204 U. S. 331, 342.

These statements were overruled in the *Williams* case on the ground that to construe Article III, Section 2, as including controversies to which the United States was a party defendant would be inconsistent with the principle that the government could not be sued without its consent. The flaw in this reasoning is the failure to distinguish the bestowal of judicial power from the waiver of sovereign immunity. From the premise that the above phrase in Article III was not intended as blanket consent by the sovereign to be sued, the Court concluded that this prevented application of the provision even where consent had been given by Congress. But like the other categories of controversies enumerated in Section 2 of Article III this particular ground of jurisdiction does not dispense with other prerequisites to the valid exercise of judicial power. For example, the judicial power extends to suits between citizens of different states, but this does not automatically confer jurisdiction. Congress must create an inferior court to exercise such jurisdiction, and the defendant must be brought into court by service of process, by consent to suit through filing of an appearance, or by other accepted judicial technique. If a defendant is without the jurisdiction, he may often be sued only

if he consents to jurisdiction. Similarly, when jurisdiction is invoked of a suit to which the United States is a party, the requirement as to obtaining personal jurisdiction over the defendant must still be observed, which means that the sovereign must consent to be sued. Once the question of personal jurisdiction or capacity is separated from that of the general jurisdiction of the court over the subject matter, it becomes plain that Mr. Justice Sutherland's correct premise that Article III, Section 2, was not a consent by the United States to be sued, does not lead to his conclusion that Article III, Section 2, excludes from the constitutional jurisdiction of the inferior courts "controversies to which the United States shall be a party" as a defendant.[36]

For his conclusion that the framers were using "party" only in the sense of "plaintiff," Mr. Justice Sutherland relied upon three historical circumstances: (1) The doctrine of sovereign immunity from suit was well known at the time of the framing of the Constitution; (2) subsequent to the Convention, Marshall, Madison, and Hamilton expressed the view that Article III did not

[36] The *Williams* case also characterized as "peculiarly suggestive" "the omission to qualify 'controversies' by the word 'all,' as in some other instances" (289 U. S. at 553, 573). We have been able to discover no intimation whatsoever in historical material to support this view, and it does not bear analysis. The category of "suits between citizens of different states" is similarly unqualified, but its comprehensiveness can hardly be questioned.

affect the immunity of individual states from suit; and (3) with respect to suits involving the United States, the Judiciary Act of 1789 conferred jurisdiction upon the circuit courts only "where * * * the United States are plaintiffs or petitioners * * *." Analysis of these factors reveals that none supports the conclusion reached.

(a) WAIVER OF SOVEREIGN IMMUNITY

While the doctrine of sovereign immunity was a "settled and well understood rule" at the time of the framing of the Constitution, it was also well known, both in England and in a number of the original states, that the sovereign could and often did waive immunity and consent to be sued.

(1) In England, the waiver of immunity became known as early as the thirteenth century when the Petition of Right first evolved. This remedy was used for almost 400 years, and consisted of a petition to the Crown setting up the claim of legal right, which, after being endorsed "let right be done," was followed by a Commission issued out of Chancery to find the facts, an answer by the Crown to the petitioner's plea, and a trial on the issue in the King's Bench on the common-law side of the Chancery. As the centuries passed, this remedy against the Crown gave way to more expeditious procedures, and extended powers of relief against the Crown by judicial proceedings became

available to the subject in several courts created during the reign of Henry VIII (the Courts of Augmentations, Wards, and Surveyors), subsequently merged into the Court of Exchequer. And while there appear to be no reported cases based upon the petition of right between 1615 and 1800, several new remedies emerged. The English experience is summarized in greater detail in Appendix B, *infra*, pp. 115–123.

In 1668, it was first clearly recognized that a subject was entitled to equitable relief against the Crown in the Court of Exchequer (*Paulett v. Attorney General*, Hardres, 465). Rejecting the Crown's contention that the plaintiff's relief was solely by a petition of right, Chief Baron Hale granted relief to a mortgagor upon a bill against the Attorney General to redeem mortgaged lands seized by the King after the mortgagee's heir had been attainted of treason. And in the next century the jurisdiction of the Court of Exchequer to give equitable relief against the Crown was still recognized. *Rocco v. Attorney General* (1741), 2 Atkyns 223; *Burgess v. Wheate*, 1 Eden. *225–256; Bl. Com. iii, 428–429. (See Appendix B, pp. 121–123, *infra*.) Thus, waiver of sovereign immunity and consequent jurisdiction

Where the relief sought from the Crown was payment of a sum due, a petition to the Barons of the Exchequer was held to lie, although petition of right was also available. *The Bankers' Case*, 14 S. T. 1 (House of Lords, 1690–1700).

in the courts to entertain judicial proceedings and grant judgments against the Crown was known in England for many centuries before the adoption of the Federal Constitution. In the eighteenth century, the already well-established rule that redress against the Crown could be secured through judicial proceedings must have been known to lawyers in the American colonies.

(2) The waiver of immunity was also known in this country both during and after the Revolution, and the courts of several of the original States were often entrusted with the adjudication of claims against the State. Broad statutory waivers of immunity were adopted in Maryland and Virginia, while a more restricted practice prevailed in Delaware, Connecticut, North Carolina, Georgia, and New Jersey. See Appendix B, *infra*, pp. 123–130. Thus in Virginia, an Act of 1778 authorized suit in "the high court of chancery or the general court" upon any alleged right in law or equity "against the commonwealth," and the Supreme Court of the State observed that "there never has been a moment since October 1778 that all persons have not enjoyed this right by express statute" to sue the Commonwealth of Virginia. See *Higginbotham's Ex'r.* v. *Commonwealth*, 66 Va. 627, 637 (1874). Shortly after the Constitution was adopted, the Court of Appeals of Virginia upheld a judgment against the State for the value of an impressed vessel, upon

a statutory reference of the claim to the judiciary after it had been administratively denied (*Commonwealth* v. *Cunningham & Co.*, 8 Va. 331 (1793)).[38]

Other states likewise had waivers of immunity. The early Delaware Constitution (1792) authorized suits "against the state according to such regulations as shall be made by law" (*Federal and State Constitutions of the U. S.*, House Doc. No. 357 (59th Cong., 2d Sess.), Vol. 1, pp. 568, 569). A Maryland statute passed January 20, 1787, antedating the Constitution, authorized actions at law against the state for money claims, with a jury trial. 2 Kilty, *Laws of Md.*; c. LIII. In Georgia, persons claiming estates confiscated during the Revolution were permitted an appeal to the superior courts from a determination of a Board of Confiscation Commissioners (1 *Revolutionary Records of Ga.*, pp. 334, 341; 3 *Id.* 409). Compare a similar procedure in North Carolina (24 *State Records of N. C.*, p. 212) and a somewhat different procedure in New Jersey, also permitting judicial determination of the right to an estate subject to confiscation (*Acts of Council & General Assembly of New Jersey* (1776–1783)—

[38] The opinion was written by Judge Pendleton who, as President of the Virginia Convention elected to consider the Constitution, had been instrumental in its ratification. The claimant was represented by "Marshall," presumably John Marshall. Cf. II Beveridge, *Life of Marshall*, p. 177.

(compiled by Peter Wilson, Trenton, 1784, printed by Isaac Collins)—pp. 43–46).[39]

B. THE INTENT OF THE FRAMERS OF THE CONSTITUTION

The waiver of sovereign immunity was thus a common practice in Anglo-American Law at the time of the adoption of the Constitution. If, as the *Williams* case suggests, the doctrine of sovereign immunity was known to the framers, the practice of waiving that immunity must have been equally familiar. That such was the case is in fact revealed in Hamilton's remarks in the *Federalist*, where he expressly distinguishes between suits with and suits without the consent of the sovereign. See Appendix C, pp. 131–135, *infra*. Against the century-old background of suits by consent against the Crown and the State, the use of the unqualified phrase "controversies to which the United States shall be a party" bespeaks an intention to extend the judicial power to cases where the United States is a party defendant upon a waiver of immunity, as well as where it is plaintiff.

Nothing in the proceedings of the Constitutional Convention indicates that the phrase in question was being used in a restrictive sense. On Au-

[39] See also indications of suits against the state in a 1789 statute of Connecticut (*Acts and Laws of Conn.*, Jan. 1789 (New London, printed by T. Green & Son), pp. 373–376); and in an early Delaware statute (2 Laws of Del. (1700–1797), vol. 2, pp. 658–659). All these are more fully discussed in Appendix B, pp. 123–130, *infra*.

gust 20, 1787, Charles Pinckney moved [40] to add to the Report of the Committee of Detail the statement that "The Jurisdiction of the Supreme Court shall be extended to all controversies between the U. S. and an individual State, or the U. S. and the Citizens of an individual State." [41] Two days later, the Committee of Detail recommended that the judicial power be extended to controversies "between the United States and an individual State or the United States and an individual person." [42] No action was ever taken on this recommendation, but on August 27, 1787, the Constitutional Convention adopted the phrase now appearing in Article III, Section 2—"Controversies to which the United States shall be a party"—upon a motion by James Madison and Gouverneur Morris.[43] This "was

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[40] *Documents Illustrative of the Formation of the Union of the American States*, H. Doc. 398, 69th Cong., 1st Sess., p. 572.

[41] A year prior thereto Charles Pinkney had drafted and presented to Congress a report on August 7, 1786, calling for an amendment of the Articles of Confederation to provide for a Federal Judicial Court whose jurisdiction was to include appellate jurisdiction from state courts "in all causes * * * wherein questions of importance may arise, and the United States shall be a party." Charles Warren, *The Making of the Constitution*, p. 329. Subsequently he submitted the same plan to the Constitutional Convention, calling for a Supreme Federal Court with appellate jurisdiction from the state courts, including jurisdiction "in all causes * * * wherein the United States shall be a party." H. Doc. 398, *op. cit.*, p. 965.

[42] H. Doc. 398, *op. cit.*, pp. 595–596.

[43] *Id.*, p. 624.

evidently adopted as a substitute for the Committee's recommendation and was probably intended to cover the same ground."[44]

There is no evidence at the Constitutional Convention of any intention that the phrase in question, more sweeping in scope than any of the preceding proposals, was used in other than its plain meaning. The delegates, most of whom were trained at the bar,[45] must have known the difference between party plaintiff and party defendant, and must have been aware that the term "party" embraces both. Since one can hardly attribute to the framers the prophetic ability to anticipate the derivation of judicial powers from an article professing to grant legislative powers, an intention to exclude from the federal judicial power the determination of claims against the Government would be tantamount to an intention to deny a mode of settling claims which had been available in the mother country for centuries. Such an intention is not easily to be conjured. Mr. Justice Sutherland, in the *Williams* case, did not suggest any possible reason why the makers of the Constitution, if they had given thought to the United States as a party defendant, would not have placed such a suit within the judicial power which they were defining. He apparently was of the view

[44] Charles Warren, *The Making of the Constitution*, pp. 536–537.

[45] Warren, op. cit. *supra*, p. 55.

that they had assumed that the Government could not be sued under any circumstances, and that therefore they did not intend Article III to give the courts jurisdiction over suits against the United States. It is more likely that, if the issue had been specifically presented, the framers would have disavowed any intention to exclude from the judicial power a class of cases, suits against the sovereign with its consent, which had been heard and decided by the English courts for centuries.[16]

The decision in the *Williams* case gains no support from the views of Marshall, Madison, and Hamilton on the suability of an individual state. Their remarks (set forth in Appendix C, pp. 131–133, *infra*) were addressed solely to the question whether there was a surrender of this immunity "in the plan of the convention." In denying that the Constitution affected the suability of the individual states, Marshall, Madison, and Hamilton were seeking to remove the fears of those, such as Patrick Henry, who believed that the Federal Constitution automatically subjected the states to suit (See Appendix C, pp. 133–134, *infra*). The Supreme Court rejected their interpretation in *Chisholm v. Georgia*, 2 Dall. 419 (1793), pointing out that the automatic waiver of state immunity, found in Section 2, did not necessarily mean an automatic waiver of Federal immunity. But

[16] Cf. Marshall, C. J., in *McCulloch v. Maryland*, 4 Wheat. 316, 407. "It is a *Constitution* we are expounding * * *."

there is no hint that suits with the consent of the government would not be embraced within the Section, for obviously none of the objections based upon sovereignty would apply where the state voluntarily submitted itself to court proceedings; and the statements of Marshall, Madison, and Hamilton had no relevance to such a situation."

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* Despite the position taken by Marshall, Madison, and Hamilton, the Supreme Court in *Chisholm* v. *Georgia*, 2 Dall. 419, held that Article III subjected a state to suit without its consent by an individual citizen of another state. The opinion of Chief Justice Jay (at p. 477)* included the following comments with respect to suits against the United States:

"Now, it may be said, if the word party comprehends both plaintiff and defendant, it follows, that the United States may be sued by any citizen, between whom and them there may be a controversy. This appears to me to be fair reasoning; but the same principles of candor which urge me to mention this objection, also urge me to suggest an important difference between the two cases. It is this, in all cases of actions against states or individual citizens, the national courts are supported in all their legal and constitutional proceedings and judgments, by the arm of the executive power of the United States; but in cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction, important conclusions are deducible, and they place the case of a state, and the case of the United States in very different points of view.

"I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided; I leave it a question."

These remarks are plainly confined to the question whether

Hayburn's Case, 2 Dall. 409, decided only five years after the Constitution was adopted, likewise contains the implication that claims against the United States would be embraced within Article III, Section 2, if the requisite judicial procedures were provided.

C. THE JUDICIARY ACT

Contrary to the suggestion in the *Williams* case, the Judiciary Act of 1789 (1 Stat. 73) is authority for, rather than against, the view that Article III of the Constitution extends the judicial power to suits against the United States. Section 11 of the Act gives to "the circuit courts * * * original cognizance * * * of all suits of a civil nature * * * where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars and the United States are plaintiffs, or petitioners." Mr. Justice Sutherland in the *Williams* case thought that the words "where * * * the United States are plaintiffs or petitioners" delineate the scope of

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Article III, without more, removes the immunity of the United States from suit. Chief Justice Jay could not have had in mind suits to which the United States had consented, for there would then be no need for "power which the courts can call to their aid."

The only other contemporary references to the question whether the United States could be sued are a statement by George Nicholas, at the Virginia Convention, and a letter from Luther Martin (Attorney General of Maryland and delegate to the Constitutional Convention) addressed to the Maryland legislature. See Appendix C, pp. 134–135, *infra*.

the phrase "controversies to which the United States shall be a Party" in Article III. This assumes that Congress intended, by the Judiciary Act, to vest in the circuit courts all the judicial power conferred in Article III. But the Act and its legislative history contradict any such intention. Thus, Section 11 of the Act expressly withholds from the circuit courts the exercise of the judicial power over suits "where the matter in dispute" does not exceed five hundred dollars, even though nothing in Article III would preclude the bestowal of jurisdiction over such matters. Moreover, the House debates on the Act show that Congress recognized a clear distinction between the extent of the judicial power conferred by Article III, and the degree to which it was to be vested in the inferior courts by the Act.[9] Under these circumstances, the more likely inference is that Congress used the words "plaintiffs or petitioners," rather than the exact language of Article III, to show that the Act was not to exhaust the judicial power conferred in Article III, nor to operate as a consent to suit.[10]

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[9] Annals of Congress, vol. I, pp. 782–785, 796–833, *passim*. The discussion, if any, in the Senate is not available, since the debates of that body were not printed until 1794, and there appear to have been no printed reports or hearings on the Act.

[10] The *Williams* case, at 289 U. S. 553, 574, cites with approval the following dictum of Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 412:

"* * * The universally received opinion is that no suit can be commenced or prosecuted against the United

In view of the foregoing considerations, we believe that the grant of jurisdiction in Article III Section 2 is not limited to cases in which the United States is a party plaintiff. The historical background upon which this conclusion is predicated was not, in all its aspects, before the Court in the *Williams* case. We submit that the words of Article III read literally and in their historic setting demonstrate that *Minnesota* v. *Hitchcock* and the earlier authorities rather than *Williams* v. *United States* state the correct doctrine, and that the judicial power exercised by the Court of Claims is part of that defined in Article III.

A matter argued but not mentioned in the opinion in the *Williams* case is that suit on a claim against the Government may be a "case arising under the laws of the United States," and for that additional reason an exercise of judicial power under Article III. This point, which was not mentioned in either the *Bakelite* or the *Williams* opinion, finds considerable support in *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423. In that case, the United States brought suit in the Court of Claims, pursuant to a special jurisdictional act, to ascertain whether an award

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States; that *the judiciary act does not authorize such suits* * * *." [Italics supplied.]

This statement suggests that the Judiciary Act, which is confined to creating inferior courts and bestowing judicial powers upon them, could have "authorized" suits against the United States.

which had been procured by the Mining Company was based upon fraud. The judgment of the Court of Claims was attacked on appeal to this Court on the ground that there was no "case or controversy" under Article III, Sec. 2 of which either the Court of Claims or this Court could take jurisdiction. This Court rejected the contention, and held the suit to be a "case arising under the laws of the United States." Mr. Justice Harlan, delivering the opinion for a unanimous court, said (175 U. S., at 455):

> II. It is said that the present proceeding based on the act of 1892 is not a "case" within the meaning of that clause of the Constitution declaring that the judicial power of the United States shall extend to all cases in law and equity rising under that instrument, the laws of the United States, or treaties made or which shall be made under their authority. Art. III, § 2. This Article, as has been adjudged, does not extend the judicial power to every violation of the Constitution that may possibly take place, but only "to a case in law or equity, in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the Article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution to

> which the judicial power of the United States would extend." *Cohens* v. *Virginia*, 6 Wheat. 264, 405. * * *.

The jurisdiction of the Court of Claims to entertain claims against the United States likewise depends on a law of the United States—i. e., the Judicial Code Sec. 145 (28 U. S. C. 250). The decision in the *La Abra* case would therefore seem to be relevant here.

If we are correct in our views that the Court of Claims exercises judicial power under Article III, it follows that the Court of Claims is a constitutional court (*O'Donoghue* v. *United States*, 289 U. S. at 546).

C. THE COURT OF CLAIMS, LIKE THE COURTS OF THE DISTRICT OF COLUMBIA, MAY EXERCISE NON-JUDICIAL FUNCTIONS EVEN IF DETERMINED TO BE A CONSTITUTIONAL COURT

If this Court should depart from the dictum in *Ex parte Bakelite* and the decision in *Williams* v. *United States* concerning the nature of the Court of Claims, and revert to the earlier pronouncements that the judicial power involved in the determination of claims against the United States is included within Article III, this will not mean that Congress cannot continue to submit matters to the Court of Claims for reports and recommendations in a non-judicial capacity. For, even as a constitutional court exercising Article III judicial power, the Court of Claims may still

render advisory opinions under Judicial Code §§ 148 or 151 (28 U. S. C. 254, 257). Although this Court has held that a constitutional court may not be required to render advisory opinions (*Muskrat* v. *United States*, 219 U. S. 346), it subsequently held that the courts of the District of Columbia, even though they exercised both judicial and non-judicial powers, were constitutional courts (*O'Donoghue* v. *United States*, 289 U. S. 516). There is no reason why the same cannot be true as to the Court of Claims.[30]

In *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, the power of the courts of the District of Columbia to take jurisdiction of appeals from the Patent Office and to render what

[30] There is also authority for the proposition that judges may act non-judicially in a voluntary capacity analogous to that of a commissioner. In *Hayburn's Case*, 2 Dall. 409, the three circuit courts expressed their opinion that the determinations which Congress had asked them to make of pension claims against the Government, subject to review by the Secretary of War, did not involve the judicial power of the United States which they were capable of exercising. The Circuit Court for the District of New York, consisting of Chief Justice Jay, Associate Justice Cushing, and District Judge Duane, was of the opinion, however, that the individual judges of the circuit court were capable of performing those functions as "commissioners" and not as a court. Subsequently the judges of the district courts did act in such capacity. See *United States* v. *Ferreira*, 13 How. 40. Similarly, the judges of the Court of Claims may assume the performance of like advisory functions at the request of Congress, sitting as commissioners and not as a court. See *Sanborn* v. *United States*, 27 C. Cls. 485, 490, mandamus to permit appeal denied, *In re Sanborn*, 148 U. S. 222.

the court characterized as "mere administrative determinations" was sustained on the ground that "Congress in its constitutional exercise of exclusive legislation over the District * * * may vest courts of the District with administrative or legislative functions which are not properly judicial" although "it may not do so with this Court or any federal court established under Article III of the Constitution." But when the District of Columbia courts were subsequently declared in *O'Donoghue* v. *United States*, 289 U. S. 516, to be constitutional courts exercising Article III judicial power, their non-judicial jurisdiction was not disapproved but was explained as the product of Congress' plenary power over the District.

The reasons impelling the Supreme Court in the *O'Donoghue* case to recognize the power of constitutional courts located in the District of Columbia to exercise non-judicial as well as judicial functions are pertinent here. The power of Congress to impose non-judicial functions upon the courts of the District is derived from the clause of the Constitution giving Congress plenary power of legislation over the District. Article I § 8, cl. 17. Congress has been given the same plenary power over claims against the Government by the other clauses of Article I § 8. Congress alone has power "to pay the Debts * * * of the United States," and may establish judicial or non-judicial machinery to

that end. Since there is thus a dual basis for the jurisdiction of the Court of Claims as well as for that of the courts of the District of Columbia, Congress should be able to request the Court of Claims to perform nonjudicial functions in addition to its judicial jurisdiction. It would seem an unduly rigid interpretation of the Constitution to hold that if Congress desires an advisory opinion it must establish a special tribunal serving such purpose only and may not make use of a court which, having judges expert in the field of claims, is best equipped to advise the legislature.

Where the courts have refused to accept advisory jurisdiction it has been for the most part under circumstances in which the court was asked to give non-judicial action a judicial guise and to render judgment in the usual manner. But here the non-judicial functions of the Court of Claims are totally distinct in procedure and form from its judicial jurisdiction. See *Pocono Pines Assembly Hotels Co.* v. *United States*, 73 C. Cls. 447.

The overruling of the *Williams* case and the reinstatement of the views uniformly held before that decision need not affect the doctrine of legislative courts as applied to the territories. The doctrine in fact originated in a case involving a territorial court. *American Insurance Co.* v. *Canter*, 1 Pet. 511 (1828), was an appeal from a decree

in admiralty rendered by a territorial court whose judges held a four-year appointment instead of the life tenure required by Article III § 1 of courts covered thereby. Faced with the prospect of having to invalidate the decree and to deny judicial powers to a territorial court so constituted this Court, in an opinion by Chief Justice Marshall, held that the limitations of Article III do not apply to a court established by Congress under the combined powers of the general and of a state government (1 Pet. at 546). This view has uniformly been applied to territorial courts (see *Ex parte Bakelite*, 279 U. S. at 450), and has never been repudiated. *Ex parte Bakelite*, 279 U. S. at 450, also stated that the courts of the District were created pursuant to congressional powers over the District of Columbia (Article I § 8) similar to those which Congress exercises over the territories (Art. IV § 3), and hence were likewise legislative courts. But this Court later repudiated that dictum, and in *O'Donoghue* v. *United States*, 289 U. S. 553, it held that the "plenary power given by the District clause of the Constitution" did not "destroy the operative effect of the judicial clause within the District"; that the courts of the District exercise judicial power of the United States and are hence constitutional courts whose judges are guaranteed against diminution of

compensation; and that unlike other constitutional courts, the courts of the District of Columbia, because of the nature of the territory within which they function, may also be given the same non-judicial jurisdiction permitted to state courts—for example, jurisdiction over quasi judicial or administrative matters. In the *O'Donoghue* case, this Court distinguished the cases involving the territorial courts on the ground that the territorial government was impermanent, limited to the period of pupilage of the territory, and that it was, therefore—

> not unreasonable to conclude that the makers of the Constitution could never have intended to give permanent tenure of office or irreducible compensation to a judge who was to serve during this limited and sometimes very brief period under a purely provisional government which, in all cases probably and in some cases certainly, would cease to exist during his incumbency of the office. (at pp 537, 538)

As limited by the *O'Donoghue* decision, the cases involving the territorial courts must be deemed to rest on the state of pupilage of the territories and their peculiar character as the temporary property of the United States; they do not require a like classification of a court such as the Court of

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The minority felt that there was no difference between the power of Congress over the courts of the District of Columbia and that over the territorial courts (289 U. S. at 551).

Claims. The Court of Claims is rather to be assimilated to the courts of the District of Columbia, whose character as constitutional courts is not affected by their exercise of non-judicial power.

IV

The Jurisdiction of This Court to Review the Judgment Below

The Court has requested that special attention be given the question of its jurisdiction to review the judgment of the court below.

This Court can only review judgments of the Court of Claims entered in a judicial capacity (*In re Sanborn*, 148 U. S. 222). If the act, contrary to its construction below, calls upon the Court of Claims to exercise a judicial function, there can be no question as to the power of this Court to review and reverse the judgment. Cf. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227. If, however, the act was properly considered to require the Court of Claims to exercise a ministerial, non-judicial function, considerable doubt arises as to the power of this Court to review the decision below.

In *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, the owner of a trade-mark appealed to the Court of Appeals of the District of Columbia from a decision of the Commissioner of Patents refusing to cancel the registration of an allegedly interfering trade-mark. The Court of

Appeals dismissed the appeal on the ground that the statutory provisions authorizing it had been repealed. An appeal from the judgment of dismissal was likewise dismissed by this Court, because decisions of the Court of Appeals on the merits in such cases were not judicial but administrative, and accordingly not subject to review in this Court. The Court pointed out that it had no power to pass even on issues of constitutional law unless presented in a justiciable case or controversy (citing *Prentiss* v. *Atlantic Coast Line Company*, 211 U. S. 210, and *Muskrat* v. *United States*, 219 U. S. 346), and said (272 U. S. at 701):

> With this limitation upon our powers, it is not difficult to reach a conclusion in the present case. We should have had no power to review the action of the District Court of Appeals if it had heard the appeal and taken administrative jurisdiction, and by the same token have now no power to review its action in refusing such jurisdiction.

The principle enunciated in that case appears broad enough to cover this determination. On the assumption that the Special Act directed the Court of Claims to perform a non-judicial function, this Court has no power, under the *Postum* decision, to review the action of the Court of Claims whether it takes or refuses jurisdiction.

There may, however, be an important distinction between the instant case and the *Postum* case.

Cf. *Muskrat* v. *United States*, 219 U. S. 346.

In the *Postum* case, the Court of Appeals, in refusing to take jurisdiction on the ground that the statute which formerly conferred it had been repealed, was acting in an administrative and non-judicial character, construing a statute which had theretofore been held to involve a non-judicial matter (*Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 443; *Baldwin Co.* v. *Howard Co.*, 256 U. S. 35; *Atkins* v. *Moore*, 212 U. S. 285). In the instant case, the Court of Claims, acting as a court, has refused jurisdiction purportedly conferred by a statute addressed to it as a court, because it considers the law to be unconstitutional. That is a determination peculiarly judicial in character (*McCullough* v. *Maryland*, 4 Wheat. 316), and one which may not normally be made by an administrative agency. *State* v. *Williams*, 232 Mo. 56; 30 A. L. R. [redacted] 378. Moreover, the Special Act sought action judicial in form, with a right to apply to this Court for certiorari (R. 1–2; §§ 2, 4). Insofar as the Court of Claims purported to be exercising its judicial power as a court and made a determination reserved exclusively to the judiciary, its decision may be reviewable here.

If this Court should conclude, upon review, that the Court of Claims erred in not performing the directed function in its non-judicial capacity, a question arises whether it may direct the Court of Claims to hear the matter in a non-judicial capacity. We suggest that the answer is in the

negative, for reasons similar to those underlying the *Postum* case. However, if it concludes that error was committed below by the court acting in a judicial capacity, this Court may, pursuant to its general powers to take such action as is most consistent with the just disposition of a case, vacate the judgment of dismissal and remand the case for correction of so much of the error as lies within the judicial orbit.

Respectfully submitted,

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OCTOBER 1944.

APPENDIX A

Act of Congress (Private Law No. 306—77th Congress).

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

SEC. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in

complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper B or pay line three inches, and to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into dry packing.

SEC. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K–366, in the Court of Claims, together with any additional evidence which may be taken.

SEC. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

Approved February 27, 1942.

APPENDIX B

WAIVER OF SOVEREIGN IMMUNITY IN ANGLO-AMERICAN LAW PRIOR TO THE ADOPTION OF THE CONSTITUTION

I. ENGLISH PRACTICE

Long before 1787 it was a common practice in England for the sovereign to waive his immunity from suit and permit individuals to assert their claims against the crown in the courts. The waiver of immunity was limited to particular types of claims and governed by special procedures. The development of these remedies against the crown are traced by W. S. Holdsworth in *A History of English Law*, Vol. IX, pp. 7–45, and may be summarized as follows:

It was recognized as early as the thirteenth century that the King was subject to the law and that, although ordinary writs did not lie against him in his courts, he was morally bound to do the same justice to his subjects as they could be compelled to do to one another. As yet, the methods by which the King could be approached were very informal. (*id.* p. 10). A request or petition for justice to the King would often assume some of the characteristics of an ordinary action. Litigants would sometimes vouch the King to warranty as if he were a common person. But the procedure for obtaining redress by petition was becoming a more settled practice and developing characteristics very different from those in an ordinary action (*id.* p. 11).

From the fourteenth to the middle of the seventeenth century, the nature of a petition of right became fixed (*id.* p. 12). Petitions which asked for something which the suppliant could claim as a right, if the claim were made against anyone but the King, were known as "petitions of right." Petitions which asked only for some favor to which the petitioner could have no legal claim were "petitions of grace." (*id.* pp. 13–14). Although the King could rightfully refuse to grant a petition of grace, he could not rightfully refuse to do what justice required when judgment had been rendered on a petition of right (*id.* p. 15).

The main use of the petition of right in the Middle Ages was to gain redress for wrongs which, if the case had been between subject and subject, would have been redressed by some of the *real* actions (*id.* pp. 17–18). The real actions covered a much larger field than that covered by the land law at the present day. Many objects which would now be effected by the making of a contract, and many wrongs which would now be redressable by action in tort were attracted to the law of property and were redressable by real actions. For example, instead of making a contract to pay a sum of money, the men of the Middle Ages granted an annuity or a corody; and where we would bring an action on the case for a nuisance, they would bring an assize of nuisance, or an assize of novel disseisin, or *quod permittat*. In addition to the wide field of wrongs redressable by the real actions, a petition would lie for a chattel interest in land; and according to the better opinion for chattels personal (*id.* p. 19).

While the petition of right did not lie for breach of contract, this was partly due to the fact that the law of contract was not yet fully developed, and partly to the fact that petitioners had alternative remedies (*id.* p. 21). Thus, a petition lay for omission to pay an annuity or a corody, because such a proceeding was regarded as a proceeding to recover an incorporeal thing; and a judgment could be given against the King to give a recompense, if he had failed in his duty to warrant the title of his grantee (*id.* p. 20). In the case of ordinary money claims, a petition to the King for a writ of Liberate, ordering the Exchequer to pay, or for a direction that the barons of the Exchequer should hear the petitioner's claim, was an easier and more expeditious remedy. In the main, however, the chief use made of the petition of right in the Middle Ages was the redress of grievances which, as between subject and subject, would have been redressed by some one of the *real* actions (*id.* p. 21).

Other remedies than the petition of right arose against the Crown because of the great procedural defects attached to the use of a petition of right (*id.* p. 22). (1) There was a lengthy preliminary procedure before the legal question at issue could be brought before the court. The petition had to be endorsed "let right be done" (*id.* p. 16). A special commission was then issued by the Chancery to take an inquest to find the facts. If the facts were not found satisfactorily, a second commission might issue to find them again (*id.* p. 22). If they were found satisfactorily, it was sometimes

necessary to put in a second petition to stir up the Crown to take the necessary step of answering the petitioner's plea and coming to an issue which could be heard on the common-law side of the Chancery, or sent into the King's Bench for trial (*id.* pp. 17, 22). In all cases begun by petition, the Crown could delay the petitioner by instituting a search for records which would support his title. (2) The Crown had many advantages in pleading. All conveyances and accounts which gave possession to the King had to be expressly stated in a petition. At any time, the King could stop a proceeding by the issue of a writ *rege inconsulto;* and the judges could not then proceed without an order from the King. (3) When the petition of right turned upon a complaint redressable by a real action (which was usually the case), all the reasons which made real actions so dilatory applied to these proceedings. (4) The rule that a demandant could recover if he could show a better right than the tenant, did not apply to the King. To recover against the King, an absolute right had to be shown (*id.* p. 23).

The procedural difficulties outlined above gave rise to the remedies by traverse and *monstrans de droit.* The procedure by traverse arose as follows: One of the most usual ways in which the King secured possession of chattels or lands belonging to a subject was by the holding of an inquisition on the death of his tenant, or on the attainder or lunacy of any person. When the inquest found that the subject was possessed of certain property, this was seized by the King, who was then said to be entitled by office found. As

a general rule, anyone whose right was set aside by this finding, e. g., a person who had been disseised by the tenant or lunatic was left to his remedy by petition. In a few cases, however, the law allowed a person aggrieved to traverse, if he could, the facts found by the office entitling the King to possession (*id.* p. 24). The number of these cases was at first very small, but was increased by statute in 1360 and again in 1362. This latter statute also established the remedy of *monstrans de droit*, which allowed the subject in certain cases to confess the title found for the King and avoid it by showing his own right (*id.* p. 25). This statute was construed liberally and was further extended by and Act of 1548 (*id.* p. 26).

These remedies had three main advantages over the petition of right: (1) They cut out all the preliminary stages of procedure attached to the petition of right—the presentation of the petition, the issue of a special commission, searches for evidence for the King. (2) It was not necessary to get the King's special permission to go on with the hearing of the case. (3) The remedy of *monstrans de droit* substituted for an inquiry at large into the title of the parties, an inquiry into a specific defect in the office (*id.* p. 26).

The new remedies also had their disadvantages (1) A party could not take advantage of a traverse unless the King had taken possession by an office found. Similarly, in order to take advantage of a *monstrans de droit*, he must have gotten seisin by office found, or in some other way which could not be traversed; and the subject must be able to confess the King's right and avoid

it by showing his own right. (2) If the King was entitled, not only by the office found, but by another title of record, the subject could not until 1548 traverse or confess and avoid both (*id.*, p. 27). (3) The analogy of the case where a disseisee's right of entry was tolled and turned to a right of action was applied to determine the question whether a complainant could sue by *monstrans* or petition of right (*id.*, p. 28). Were it not for these limitations, the remedies of traverse and *monstrans de droit* would have completely superseded the petition.

In addition to these two new remedies, extended powers of relief against the Crown became available to the subject in the new Courts of Augmentations, Wards, and Surveyors, which were created by statute in the reign of Henry VIII and subsequently merged into the Court of Exchequer (*id.* p. 29). While these courts were primarily administrative departments for the management on business lines of a vast quantity of property, they were given judicial powers which were very likely to be used when the Crown itself was a party. The Court of Augmentations, erected by statute in 1536, served partly as a department of audit, partly as an estate office, and partly as a franchise court to deal with the vast quantity of land confiscated from monasteries. The Court of Wards, created in 1540, was similarly constituted to manage the ancient feudal revenues of the Crown and especially to enforce the rights of wardship and marriage. The jurisdiction of these courts and the Court of Surveyors was varied many times by statute, copies of which

are not all available.[1] Generally speaking, it seems that these financial courts entertained claims with respect to the particular property turned over to such courts for administration (*id.* p. 30).[2]

From 1615 to the first part of the nineteenth century, there appear to be no reported cases based upon the petition of right.[3] However, during this period, several new remedies emerged for securing relief against the Crown.

Equitable relief.—In the case of *Pawlett* v. *The Attorney General*, Hardres, 465 (1668),[4] it was first clearly recognized that the subject was entitled to equitable relief against the Crown. In that case the plaintiff had mortgaged property to a mortgagee. The legal estate had descended to the mortgagee's heir, who had been attainted of treason. The King had therefore seized his property. The plaintiff brought his bill in the Exchequer against the Attorney General for redemption. In finding for the plaintiff, the court rejected the argument that the plaintiff could only proceed by petition to the King. Chief Baron Hale based his decision on the ground that the Exchequer had jurisdiction in the matter as inheritor of the powers of the Courts of Augmentations and Surveyors. Atkyns B. put the

[1] Plucknett, *A Concise History of the Common Law*, 3d Edition, p. 158.

[2] For example, the statute of 1541 (33 Henry VIII, c. 39) creating the Court of Surveyors, authorized the Court of Augmentations to determine claims by patentees against the King for defects in the interests which the King had purported to tranfer to them.

[3] L. Ehrlich, *Petitions of Right*, 45 L. Q. Rev. 60, 61, 62.

jurisdiction on a much broader basis, but his view was not accepted until after the eighteenth century. For some time the jurisdiction to give equitable relief against the Crown was supposed to be peculiar to the Court of Exchequer' (*id.* p. 30).

Petition to the barons.—Another remedy against the Crown arose out of the celebrated *Bankers'* case, 14 S. T. 1, (1690–1700). In return for certain loans, Charles II granted to the Bankers annuities charged on the hereditary excise. After 1683, paymnts were in arrears, and after the Revolution, the Bankers presented a petition to the barons of the Exchequer for payment of the amounts due to them. The case turned on whether this was a proper method of procedure for asserting such a claim, and the House of Lords held in the affirmative. All the judges were of the opinion that the Bankers could also have proceeded by petition of right. This case was of considerable influence in the revival of the petition of right during the nineteenth century (*id.* pp. 32–33). As a result of the *Bankers'* case, the subject could now not only petition for a writ of Liberate, but also petition the barons of the Exchequer for relief (*id.* p. 35).

Thus, the study by Holdsworth shows that there had developed a number of judicial procedures in England, for asserting claims against the sovereign, including (1) the petition of right, (2) traverse of office found, (3) *monstrans de droit*, (4) writ of liberate, (5) peti-

'Citing *Ridge* v. *The Attorney General* (1711), 2 Atkyns 223; *Burgess* v. *Wheate*, 1 Eden at pp. 255–256; Bl. Comm., iii. 428–429.

tion to the barons of the Exchequer, and (6) bill against the Attorney General for equitable relief in the Court of Exchequer.— Accordingly the practice of waiving the sovereign's immunity from suit was well known to English Law long before the adoption of the Federal Constitution in America.

II. AMERICAN PRACTICE

1. According to the Virginia Court of Appeals, "it has ever been the cherished policy of Virginia to allow her citizens and others the largest liberty of suit against herself; and there never has been a moment since October 1778 (but two years and three months after she became an indepedent state) that all persons have not enjoyed this right by express statute" *Higginbotham's Executor* v. *The Commonwealth*, 66 Virginia 627, 637 (1874). The statute here referred to was an Act of 1788[9] establishing a Board of Auditors for public accounts, and including the following provision:

> V. Where the auditors acting according to their discretion and judgment shall disallow or abate any article of demand against the commonwealth, and any person shall think himself aggrieved thereby, he shall be at liberty to petition the high court of chancery or the general court, according to the nature of his case, for redress, and such court shall proceed to do right thereon; and a like petition shall be allowed in all other cases to any other

[9] 9 Hennigs. *Statutes at Large*, p. 540.

person who is entitled to demand against the commonwealth any right in law or equity.

An exception to this Act seems to have been adopted in the case of impressed property, for, by and Act of November, 1781,[8] the county courts were empowered to receive claims against the public for impressed property, for the purpose of ascertaining the value of the property and then submitting to the legislature a report and a transcript of the proceedings. However, even with respect to impressed property, there is a reported case in which the legislature referred the claimant back to the courts, and he succeeded in securing a judgment in his favor.

In *Commonwealth* v. *Cunningham & Co.*, 8 Va. 331 (1793), the owner of a vessel impressed during the Revolutionary War presented his claim to the county court and in 1784 secured a certificate covering its value. When the auditor refused to honor the certificate, the claimant applied to the legislature which referred him back to the judiciary. A judgment for his favor in the district court was affirmed by the Court of Appeals. The opinion of the court was written by Judge Pendleton who had been President of the Virginia Convention elected to consider the Constitution and who had employed his influence to obtain its ratification.[8a] The report of the case shows that the claimant was represented by

[8] 10 Henings, *Statutes at Large*, p. 468. "An Act for adjusting claims for property impressed or taken for public service."

[8a] 8 Va. vii.

"Marshall." No doubt this was John Marshall, for Beveridge states (A. J. Beveridge, *The Life of John Marshall*, vol. II, p. 177) that from 1790 until 1799 Marshall argued 113 cases decided by the Court of Appeals, and appeared in practically every important case handled by that tribunal.

2. In Maryland, the legislature, on January 20, 1787, adopted the following statute "to provide a remedy for creditors and others against the state":

> Whereas individuals may have claims against this state for money, which they cannot settle and adjust with the auditor-general, and it is reasonable that some mode should be adopted to afford such individuals an opportunity of trying the justice of their claims at law;
>
> II. *Be it enacted, by the General Assembly of Maryland*, That any citizen of this state, having any claim against this state for money, may commence and prosecute his action at law for the same against this state as defendant, by issuing a summons directed to the attorney-general, and sending with such summons a short note expressing the cause of action, and such person may declare, that the state is indebted unto him in any sum he thinks proper, and the attorney-general shall plead thereto, and the issue shall be made up, and the jury shall try such issue or issues, and if they find for the plaintiff, they may assess such damages as they may think just, and the same shall be paid by the state, and with costs, if the jury find more due to the plaintiff than admitted by the auditor, but if the jury find for the state, the plaintiff shall pay costs of suit, and be liable to

execution therefor; and the attorney-general shall exhibit the claim of the state, if any, and if the jury shall find that the plaintiff is indebted to the state, they may find accordingly, and judgment may thereupon be entered and given against him for such sum and costs of suit, and such plaintiff may appeal in the same manner as private persons can by law appeal in suits between them, on giving bond with security, and the attorney-general may also appeal if he thinks proper.

III. *And be it enacted,* That where any person shall file a bill in chancery against the state, that process shall and may be served on the attorney-general, which service shall be effectual to all intents and purposes, according to the notice of the process issued; provided, that where any injunction is prayed to stay proceedings at law for the payment of any debt claimed by the state, the chancellor shall not order such injunction on the affidavit of the complainant only, but shall be fully satisfied by other proof, that the material facts in the complainant's bill are true.

3. Under the Georgia Confiscation Act of 1778, forfeiting the estates of persons disloyal to the state during the revolution, all persons claiming any right or interest in a sequestered estate or pretending to be a creditor of the person attainted were to produce and exhibit their claims to a Board of Confiscation Commissioners in the county. The Attorney General was directed "to defend the right of the State, as well before the said boards, as in any of the Superior Courts

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[2] Kilty, *Laws of Maryland*, c. LIII.

against the same," and discontented claimants were given the right of appeal from the "determination" of the Board to the Superior Courts.[8] In accordance with this procedure, we find a report of the "Committee on Petitions" of the legislature in 1782 making the following recommendation:

> No. 131 of Elizabeth Whitfield Setting forth that a Certain Lott of Land in the Town of Savannah Sold by the Commissioners of Confiscated Estates, Praying for the said Lott of Land. The Committee are of opinion it ought to be referred to a Court of Law; which was agreed to.[9]

4. Under the New Jersey Confiscation Act of April 18, 1778, the procedure to recover lands improperly seized by the state was in some respects similar to the remedy of traverse of office developed in England. The Commissioners appointed pursuant to the Act were to "make return" to a justice of the peace in the county, of the name and place of late abode of each person "whose Personal Estate and Effects the said Commissioners * * * have seized" and to demand a precept for the summoning of a jury to inquire whether the named person was an offender within the meaning of the Act. After an inquisition by a jury, the justice of the peace was to certify the inquisition and make return to the next Inferior Court of Common Pleas. If the jury found the person to be an offender, a proclamation was to be made in open court to the

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[8] *The Revolutionary Records of the State of Georgia* (Compiled by Allen D. Candler, Atlanta, 1908), vol. 1, pp. 334, 341-342.

[9] *Op. cit.* vol. 3, p. 409.

effect that the "Person against whom such inquisition hath been found or any Person on his Behalf, or who shall think himself interested in the Premises" might appear and traverse the inquisition. Upon the filing of a bond, the traverse was to "be received and a Trial thereon awarded." If no person appeared to traverse the inquisition, the commissioners were to publish the effect of the proclamation within thirty days after which another opportunity to traverse was to be provided. Should there then be no appearance, the inquisition was to be taken as true and final judgment entered in favor of the state.[10]

5. Under the North Carolina Confiscation Act of 1779, establishing Boards of Commissioners in each county to administer and sell the estates declared forfeited by the Act, it was provided "that if it shall appear to any County Court that any Person * * * has or pretends to have any Right of Title in Law" to any of the property declared forfeited by the Act, "such Court shall stay all further proceedings of the Commissioners thereupon, and shall send up a true and exact State of such Claim to the Superior Court of the District" which was then to "determine the Legal Right and Title of the Person so claiming, by Jury in the same Manner as in Suits at Common Law, and such Determination when had shall be final * * *."[11] By a later act of 1781, further effort was made to protect the property of

[10] *Acts of the Council and General Assembly of the State of New-Jersey* (1776–1783), compiled by Peter Wilson, Trenton, 1784, printed by Isaac Collins, pp. 43–46.

[11] *The State Records of North Carolina* (edited by Walter Clark, Goldsboro, N. C., 1905), vol. 24, p. 212.

"innocent persons" by providing that the county courts were to "make inquiry" to determine what persons "in the opinion of the court" had forfeited their property, and were then to furnish copies of such proceedings to the commissioners of confiscated property. Seemingly, aggrieved persons might institute a proceeding for the return of their property, for the statute expressly provided that the county courts were "impowered at any time to re-consider" their determinations, and "if necessary, to order the property returned to the owners."[12]

6. Delaware clearly recognized that its immunity from suit might be waived, for, Article I, Section 9, of its constitution of 1792 provided that: "* * * Suits may be brought against the State, according to such regulations as shall be made by law."[13] Earlier, under the statutes confiscating the property of persons disloyal to the state during the Revolutionary War, the courts had played a significant role in adjudicating claims of wrongful seizure and claims by creditors. By the Act of June 5, 1779, it was provided "That the Justices of the Court of Common Pleas in each county" were "to receive the claims and order the trials respecting the title of any * * * lands * * * sold" by virtue of the Act "and claimed by any person * * *." A jury of twelve was to be summoned "to hear, try and

[12] *Id.*, p. 398.

[13] *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America*, House Document No. 357 (59th Cong., 2nd Sess.), vol. 1, pp. 568, 569.

determine" such claims and its verdict was to be "final and conclusive to all parties without further appeal." [14]

7. There is some evidence that the judiciary of Connecticut participated in the settlement of claims against the state. This evidence is found in the Act of January 1789, which provided:

> That from and after the first Day of March next, *all Demands against this State, not first liquidated and allowed by* the General Assembly, or by the Governor and Council; or House of Representatives, or *Supreme Court of Errors*, or *by the Superior Court*, or *by a Court of Common Pleas*, by Virtue of some express Law; shall be liquidated and settled by the Comptroller, who shall give Orders on the Treasurer, for the Balances, by him found and allowed, before the Treasurer shall pay the same; any Thing in said Act notwithstanding.[15] [Italics supplied.]

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[14] *Laws of the State of Delaware* (1700–1797), (printed by Samuel and John Adams, New-Castle, 1797), vol. 2, pp. 658–659.

[15] *Acts and Laws, Made and Passed by the General Court or Assembly of the State of Connecticut, in America;* holden at New Haven (by Adjournment), on the first Thursday of January 1789; (New London; printed by T. Green and Son), pp. 375–376.

APPENDIX C

Excerpts From Writings and Debates on the Federal Constitution

I. Comments on the provision of Article III extending the judicial power "to Controversies between a State and Citizens of another State":

1. *Alexander Hamilton* (Federalist, No. 81, II, pp. 125–126):

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sov-

ereign, and have no pretension to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

2. *John Marshall* (Elliot's Debates, 2d. Ed., pp. 555–556):

With respect to disputes *between a state and the citizens of another state,* its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be a partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If

an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another state, without the establishment of these tribunals? . . .

3. *James Madison*. (Elliot's Debates, 2d. Ed., III, p. 533):

> Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.

4. *Patrick Henry* (Elliot's Debates, 2d. Ed., III, pp. 543–544):

> As to controversies between a state and the citizens of another state, his construction of it is to me perfectly incomprehensible. He says it will seldom happen that a state has such demands on individuals. There is nothing to warrant such an assertion. But he says that the state may be plaintiff only. If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant. What says the honorable gentleman? The contrary—that the state can only be plaintiff. When the state is debtor, there is no reciprocity. It seems to me that gentlemen may put what construction they please on it.

> What! is justice to be done to one party, and not to the other? If gentlemen take this liberty now, what will they not do when our rights and liberties are in their power? He said it was necessary to provide a tribunal when the case happened, though it would happen but seldom. The power is necessary, because New York could not, before the war, collect money from Connecticut! The state judiciaries are so degraded that they cannot be trusted. This is a dangerous power which is thus instituted. For what? For things which will seldom happen; and yet because there is a possibility that the strong, energetic government may want it, it shall be produced and thrown in the general scale of power. I confess I think it dangerous. Is it not the first time, among civilized mankind, that there was a tribunal to try disputes between the aggregate society and foreign nations? Is there any precedent for a tribunal to try disputes between foreign nations and the states of America? The honorable gentleman said that the consent of the parties was necessary: I say that a previous consent might leave it to arbitration. It is but a kind of arbitration at best.

II. Comments on the provisions of Article III extending the judicial power "to controversies to which the United States shall be a Party":

1. *Luther Martin's* letter to the legislature of Maryland (Elliot's Debates, 2d Edit., I, pp. 344, 382):

> Thus, sir, in consequence of this appellate jurisdiction, and its extension of facts as well as to law, every arbitrary act of the general government, and every oppression of all that variety of officers appointed

under its authority for the collection of taxes, duties, impost, excise, and other purposes, must be submitted to by the individual, or must be opposed with little prospect of success, and almost a certain prospect of ruin, at least in those cases where the middle and common class of citizens are interested. Since, to avoid that oppression, or to obtain redress, the application must be made to one of the courts of the United States—by good fortune, should this application be in the first instance attended with success, and should damages be recovered equivalent to the injury sustained, an appeal lies to the Supreme Court, in which case the citizen must at once give up his cause, or he must attend to it at the distance, perhaps, of more than a thousand miles from the place of his residence, and must take measures to procure before that court, on the appeal, all the evidence necessary to support his action, which even if ultimately prosperous, must be attended with a loss of time, a neglect of business, and an expense, which will be greater than the original grievance, and to which men in moderate circumstances would be utterly unequal.

2. *George Nicholas,* at the Virginia Convention (Elliot's Debates, 2d Ed., III, pp. 476–477):

* * * But he supposes that Congress may be sued by those speculators. Where is the clause that gives that power? It gives no such power. This, according to my idea, is inconsistent. Can the supreme legislature be sued in their own subordinate courts, by their own citizens, in cases where they are not a party? They may be plaintiffs, but not defendants. * * *

U. S. GOVERNMENT PRINTING OFFICE 1944